DOCKET

o. 83-1334-CFH Title: Andrew J. Winston, Sheriff and Aubrey M. Davis, Jr., Petitioners
Status: GRANTED v.
Rudolph Lee, Jr.

Docketed:
December 13, 1983 Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Garrett III, Stacy F.

Counsel for respondent: Winston, Joseph Rylanc

ntry	Date	Note	Proceedings and Orders
1	Dec 13 1983	G	Petition for writ of certiorari filed.
2	Feb 21 1984		Brief of respondent Rudolph Lee, Jr. in opposition filed.
3	Feb 21 1984	S	Motion of respondent for leave to proceed in forma pauperis filed.
4	Feb 21 1984	N	Motion of respondent to expedite consideration of the petition for a writ of certiorari filed.
5	Feb 27 1984		DISTRIBUTED. March 2, 1984. (Above motions).
7	Mar 5 1984		Motion of respondent for leave to proceed in forma pauperis GRANTED. Justice Marshall DLT.
9	Mar 9 1984		REDISTRIBUTED. March 16, 1984
11	Mar 19 1984		REDISTRIBUTED. March 23, 1984
14	Mar 26 1984		REDISTRIBUTED. March 30, 1984
16	Mar 3 1984		Appendix of petitioner Winston, Sheriff, et al. filed.
18	Apr 6 1984		REDISTRIBUTED. April 13, 1984
20	Apr 16 1984		Petition GRANTED.
			**********
22	Jun 4 1984		Order extending time to file brief of petitioner on the merits until June 14, 1984.
23	Jun 15 1984		Joint appendix filed.
24	Jun 15 1984		Brief of petitioner Winston, Sheriff, et al. filed.
25	Jul 5 1984		Record filed.
26	Jul 5 1984		Certified original record & C.A. proceedings received.
27	Jul 11 1984		Brief of respondent Rudolph Lee, Jr. filed.
28	Aug 8 1984		CIRCULATED.
29	Aug 28 1984		SET FOR ARGUMENT. Wednesday, October 31, 1984. (1st case)
30	Oct 29 1984	X	Supplemental brief of respondent Rudolph Lee, Jr. filed.
31	Oct 31 1984		ARGUED.

PETITION FOR WRIT OF CERTIORARI

83-1334

Office - Supreme Court, U.S.
FILED
DEC 13 1983
ALEXANDER L. STEVAS
CLERK

IN THE

UNITED STATES SUPREME COURT

OCTOBER 1983 TERM

ANDREW J. WINSTON
and
AUBREY M. DAVIS, JR.,

Petitioners,

v.

RUDOLPH LEE, JR.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHEN THE INTENDED VICTIM OF A ROBBERY SHOOTS HIS ALLEGED ASSAILANT, IS IT A VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO REQUIRE THE ALLEGED ASSAILANT TO UNDERGO AN INVOLUNTARY ROUTINE SURGICAL PROCEDURE FOR THE REMOVAL OF A BULLET LODGED IN HIS SHOULDER, WHERE THE BULLET IS LOCATED APPROXIMATELY ONE INCH BELOW THE SURFACE OF THE SKIN, THE INTENDED SURGERY WOULD LAST LESS THAN THIRTY MINUTES IN DURATION, THE SURGICAL INCISION WOULD BE APPROXIMATELY TWO AND ONE-HALF CENTIMETERS DEEP AND FIVE CENTIMETERS LONG, THE OPERATING SURGEON WOULD USE A GENERAL ANESTHETIC, AND THE RECOVERED BULLET WOULD BE USED IN THE ALLEGED ASSAILANT'S CRIMINAL TRIAL ON FOUR FELONY CHARGES RELATING TO THE ATTEMPTED ROBBERY?

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE UNITED STATES SUPREME COURT:

Come now your petitioners, Andrew J. Winston, Sheriff of the City of Richmond, Virginia, and Aubrey M. Davis, Jr., Commonwealth's Attorney for the City of Richmond, Virginia, by counsel, and respectfully present their Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit.

PARTIES TO THE PROCEEDING

The Petitioners in this proceeding are Andrew J. Winston, Sheriff of the City of Richmond, Virginia, and Aubrey M. Davis, Jr., Commonwealth's Attorney for the City of Richmond, Virginia; they are represented by Stacy F. Garrett, III, Esquire, a member of the Bar of this Honorable Court.

The Respondent in this proceeding is Rudolph Lee, Jr., currently an inmate in the Richmond [, Virginia] City Jail; he is represented by Joseph Ryland Winston, Esquire, also a member of the Bar of this Honorable Court.

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OPINIONS DELIVERED IN THE COURTS BELOW

The initial federal decision in the instant matter was reported in Lee v. Winston, 551 F. Supp. 247 (E.D. Va. 1982).

The decision which is the subject of this petition was reported in Winston et al. v. Lee, _____ F. 2d _____ (No. 82-6762, 4th Cir. 1983).

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals for the Fourth Circuit was entered in Case No. 82-6762 on September 14, 1983.

It is petitioners' contention that 28 U.S.C.A. § 1254 confers upon this Court jurisdiction to review the judgment of the United States Court of Appeals for the Fourth Circuit by writ of certiorari.

EDITOR'S NOTE

PAGES 7 through 17 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

CONSTITUTIONAL PROVISION INVOLVING THIS CASE

The Fourth Amendment to the United States Constitution states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On July 18, 1957, at approximately 1:00 A.M., Ralph E. Watkinson was closing his place of business when he observed a man coming towards him from across the street. Noticing that the approaching subject was armed, Watkinson drew his own gun and fired [illegible] the first shot [illegible]

The police responded immediately, and within twenty minutes had apprehended Rudolph Lee, Jr., eight blocks away; he was suffering from a gunshot wound in the left chest area. Watkinson and Lee were transported separately to a local hospital, but upon arrival, were placed in the same emergency room by medical personnel. Upon seeing Lee, Watkinson exclaimed, "That's the man that shot me."

Lee reported that he had been the victim of a robbery in which he had been shot. A police investigation revealed Lee's story to be untrue, and Lee was charged with four felony charges growing out of the attempted robbery and shooting of Watkinson. Petitioner Davis, as Commonwealth's Attorney for the City of Richmond, Virginia, filed a Motion to Compel Evidence, seeking to recover the bullet in Lee's left chest area through surgery, an act which Lee would not undergo voluntarily.

A series of hearings was held in the Circuit Court of the City of Richmond on the motion, with Lee represented by counsel at all times. After hearing testimony from the arresting officer, a forensic scientist and the surgeon who would remove the bullet, the court ruled that the bullet could properly be removed. The court's ruling was based upon findings that the bullet was located one-half centimeter below the skin, that it could be removed with the use of local anesthesia in an appropriate medical hospital with little, if any, risk of harm or injury to Lee.

The Circuit Court stayed execution of its order to enable Lee to seek appellate review, which he did by seeking petitions for writs of prohibition and habeas corpus in the Supreme Court of Virginia. After considering written briefs and oral arguments, the Supreme Court of Virginia treated the petitions solely as a request for prohibition, and denied same.

Lee then filed a petition for a writ of habeas corpus and a suit under 42 U.S.C. § 1983 in the federal district court in which he sought injunctive relief against the proposed surgery.

On October 15, 1982, the federal district court ruled that under the circumstances as then presented, the proposed surgery presented virtually no risk of harm to Lee, and denied all relief. Action was then initiated to have the surgery performed at the Medical College of Virginia (MCV) Hospital on October 18, 1982. The original surgeon, who had testified at the original hearing in the Circuit Court of the City of Richmond, refused to perform the surgery over Lee's objections, so a second surgeon was designated. He ordered the standard pre-operative tests, including X-rays. The X-rays pinpointed the location of the bullet as being between two-and-a-half to three centimeters deep into the muscle substance. The bullet most likely

(the next page is -12-)

had not moved; its position was now just firmly pinpointed.

The new surgeon decided that it would be safer to remove the bullet under general anesthesia. Lee's counsel was informed of this development and also of the fact that MCV personnel had done a work-up on Lee to determine his fitness to undergo general anesthesia. Claiming that surgery utilizing a general anesthesia would violate his fourth amendment rights, Lee filed a motion for a rehearing in the Circuit Court of the City of Richmond on October 18, 1982.

On October 22, 1982, a hearing was held before a different judge; Lee's counsel objected to the hearing being held, claiming insufficient time to acquire the presence of an "independent" anesthesiologist to contradict the testimony of the anticipated anesthesiologist.

After hearing from the initial tending physician and the anticipated

anesthesiologist, the Circuit Court judge found that there had been no material change in circumstances and ruled that the surgery could proceed. Lee's counsel then dropped off a motion for a rehearing at the Virginia Supreme Court while enroute to the federal district court, where he requested and was granted a new hearing, and was given approximately two weeks to gather and present "any evidence" he deemed appropriate.

At the district court hearing, Lee never did present an anesthesiologist, but instead presented a "general surgeon" who had never examined Lee, but nevertheless he testified about the proposed surgery and his opinion as to the medical risks involved.

The federal district court concluded that the surgery as contemplated, especially the use of a general anesthesia, would constitute an unreasonable search within the meaning of the fourth amendment. The court enjoined the petitioners herein

from taking any steps to recover the bullet involuntarily. The petitioners appealed to the United States Court of Appeals for the Fourth Circuit.

On appeal, the circuit court agreed that the proposed surgical procedure would constitute an unreasonable search in violation of Lee's fourth amendment rights, and affirmed the judgment enjoining any surgery. But the circuit court vacated the district court's order granting a writ of habeas corpus, stating that the claim was not properly cognizable as a petition for habeas corpus under 28 U.S.C. § 2254.

The September 14, 1983, judgment of the Circuit Court forms the basis for this petition for a writ of certiorari.

In the court of first instance (the federal district court), jurisdiction was exercised by the court pursuant to 28 U.S.C. § 2241(c)(3) re the habeas claim and pursuant to 28 U.S.C. § 1343(3) re the claim under 42 U.S.C. § 1983.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

Rule 17.1 of this Honorable Court sets forth three basic guidelines or reasons that will be considered in granting a writ of certiorari. Petitioners respectfully submit that the instant case falls within two of the three: the circuit court's decision is in conflict with the decision of another circuit court and it also has decided an important question of federal law which has not been, but should be, settled by this Honorable Court. See Rule 17.1(a) and (c).

In its decision, the Circuit Court initially stated the basic principle that once the state has demonstrated the relevancy of evidence and the inability to obtain it otherwise, the reasonableness of removing it forcibly from a person's body is judged by the extent of the surgical intrusion and the risks to the subject, citing United States v. Crowder, 543 F.2d

312 (D.C. Cir 1976) (en banc), cert. denied, 429 U.S. 1062 (1977). Crowder has since been recognized as the leading case as to the limits a surgical procedure can be carried and what procedures must be followed in executing the surgery. In Crowder, the subject was shot twice, once in the thigh and once in the forearm. Since removal of the bullet in the thigh might have caused the reduction of use or function of the subject's leg, its removal was forbidden. The bullet in the forearm, however, was another story: since its removal would result in negligible risk to the subject, the court sanctioned the surgery, since it was a "minor" operation.

The Circuit Court herein relied heavily on this Honorable Court's decision in Schmerber v. California, 384 U.S. 757 (1966), wherein the use of a needle to withdraw blood from a suspected drunken driver was approved. The Circuit Court referred to the prick of the needle as the

terminal point on the range of permissible police practices in body searches. But that rationale is directly contradicted by the District of Columbia Circuit Court in Crowder, supra., where it pointedly stated that

> ". . . We cannot agree that [no intrusion into a man's body that goes beyond a needle prick can ever be authorized by a court] is or ought to be the law." 543 F.2d at 316.

The conflict between Crowder on one hand and the instant case on the other is one that needs settling; the former gives guidelines as to involuntary surgery, and this Honorable Court denied a review via certiorari, whereas the latter decrees a rather harsh limitation, that being the prick of a needle. The necessity for court-ordered surgical procedures of the type found herein is very real, and there must be some degree of uniformity as to its availability to law-enforcement personnel.

The second ground relied upon is even

more pressing. The Fourth Amendment to the United States Constitution, set out verbatim in another portion of this petition, states that the intended freedom is one from unreasonable searches. What constitutes an unreasonable search when the means of search is a surgeon's scalpel? In Schmerber, supra., this Honorable Court observed that

> "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." 384 U.S. at 768.

The extent that a search for a bullet in a suspect's body can be taken is a subject of great concern for all law-enforcement personnel involved in violent crime-solving. When can the bullet be removed? When must the subject be allowed to keep the bullet inside him, thus withholding evidence of the crime at virtually no risk to himself? Does the

mere use of a general anesthesia render all proposed bullet-removal surgery verboten? What is the terminal point of permissible intrusion into the human body, when the end result is an attempt to protect those who constitute our society?

Clearly, when there is a real risk of injury to the subject, surgery should not be permitted. Likewise, it is almost foolish to argue against the allowance of surgery to remove bullets directly under the skin. The crucial issue is met head-on when the bullet is one inch below the surface of the skin, the subject is in excellent health and is an excellent candidate for both surgery and receiving a general anesthesia, the surgery is considered to be a minor surgical procedure by the medical personnel involved, and the risk to the subject is clearly insubstantial. Such is the case here.

As of this time, five states and the District of Columbia have authorized some

form of court-ordered surgery to remove evidence to be used in a criminal prosecution of one type or another: Georgia [Creamer v. State, 192 S.E.2d 350 (1972), where the bullet was located in the fatty area of the right side of the chest, in the area of the muscle; Allison v. State, 199 S.E.2d 587 (1974), where the bullet was lodged superficially in the right side of the back]; Missouri [State v. Richards, 585 S.W.2d 505 (1979), where the bullet was located in the right hip four inches below the surface of the skin]; Florida [Doe v. State, 409 So.2d 25 (1981), where the bullet was lodged near the subject's groin of his left leg]; South Carolina [State v. Allen, 291 S.E.2d 459 (1982), where the bullet was alongside the tip of the subject's left shoulder blade]; District of Columbia [United States v. Crowder, supra., where the bullet was in the forearm immediately below the skin; Hughes v. United States, 429 A.2d 1339 (1981), where three bullets were located just under

the skin in the subject's right side and hip]; and Virginia, the instant case.

There needs to be some uniformity of what is constitutionally permissible, and there needs to be set forth a test in which the risk to the patient is the principal factor which must be considered. This is important because in the instant case, the emphasis of the court was really not on the risk to the patient, but the graphic details of the surgery involved, which was nothing more than a description of a routine minor surgical procedure under general anesthesia.

The issue is of such importance that this Honorable Court should grant a writ of certiorair to settle this most important issue.

APPENDIX

Following hereafter is a copy of the judgment sought to be reviewed.

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Petition for Writ of Certiorari were mailed, first-class postage prepaid, to Joseph Ryland Winston, Esquire, Suite 101, Jefferson Building, 8100 Three Chopt Road, Richmond, Virginia 23229, on this 13th day of December, 1983.

Stacy J. Sennett, III

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-4703

Rudolph Lee, Jr.,

Appellee,

versus

Andrew J. Winston, Sheriff;
Aubrey M. Davis, Jr.,

Appellants,

and

Gerald Baliles; Virginia Court,
City of Richmond, Division I,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

Argued March 9, 1983. Decided September 14, 1983

Before WIDENER, PHILLIPS, and SPROUSE, Circuit Judges.

Stacy P. Dawson, III, Deputy Commonwealth's Attorney (Aubrey M. Davis, Jr., Commonwealth's Attorney on brief) for Appellants; Joseph Ryland Winston (Moore, Lubman & Davidson on brief) for Appellee.

PHILLIPS, Circuit Judge:

Andrew J. Winston, Sheriff of the City of Richmond, Virginia, and Aubrey M. Davis, Jr., Commonwealth's Attorney for the City of Richmond, Virginia, appeal an order of the district court enjoining them from removing a bullett from the chest of Rudolph Lee and issuing a writ of habeas corpus. The Commonwealth of Virginia moved in state court to compel Lee to undergo surgery for the removal of a bullet believed to be relevant evidence in a criminal investigation. Lee countered by filing a petition for writ of habeas corpus and a complaint under 42 U.S.C. § 1983 against Winston and Davis in federal court, contending that the involuntary removal of the bullet by surgery would violate his fourth amendment right to be free from unreasonable searches. Following a series of hearings in both state and federal courts the district court enjoined Winston

and Davis from removing the bullet and also issued a writ of habeas corpus to the extent of precluding custody over Lee for purposes of removing the bullet. Because we agree that the proposed involuntary surgery would be so intrusive as to violate Lee's fourth amendment rights, we affirm the judgment of the district court enjoining, under § 1983, removal of the bullet. Because we conclude that Lee's claim was not one cognizable in habeas corpus under 28 U.S.C. § 2254, we vacate the order issuing the writ.

On July 18, 1982, at approximately 1:00 a.m., Ralph E. Watkinson was closing his business in Richmond when he noticed a man approaching the store from across the street. Seeing that the man was armed, Watkinson drew his own gun and a shoot-out ensued. Watkinson fired several shots, hitting the stranger in the left side of the body; the stranger returned fire, wounding Watkinson, and then fled into the

night.

The police responded immediately, and within twenty minutes they apprehended Rudolph Lee about eight blocks from Watkinson's store. Lee was suffering from a gunshot wound to the left side of his chest. Lee and Watkinson were transported separately to a local hospital where they were placed in the same emergency room by medical personnel. Watkinson, on seeing Lee, exclaimed, "That's the man that shot me."

Lee told police that he had himself been the victim of a robbery by two males, who took his personal property and then shot him in the chest. After investigating Lee's story, the police determined it to be untrue and Lee was charged with four felony counts. The Commonwealth Attorney for the City of Richmond also filed a Motion to Compel Evidence in order to recover surgically the bullet in Lee's

chest, an act Lee would not undergo voluntarily.

A series of hearings was held in Richmond Circuit Court on the motion, with Lee represented by counsel at each step. After hearing testimony from the arresting officer, a forensic scientist and the surgeon who would remove the bullet, the court ruled that the bullet could properly be removed. This ruling was based on findings that the bullet, believed to be only one-half centimeter below the skin, could be removed with the use of local anesthesia and with very little risk of harm or injury.[1/]

1/ The court also found that removal of the bullet was justified because the surgery was a minor procedure that would be done in a hospital under medical safeguards to insure Lee's health. Prior to entry of this order Lee had several adversarial hearings, where he was represented by counsel and had a full opportunity to call and examine witnesses. The court also permitted Lee to seek appellate review before the order was enforced

The court stayed execution of its order to enable Lee to seek appellate review, which he did by way of petitions for writs of habeas corpus and prohibition in the Virginia Supreme Court. That court treated the petition solely as a request for a writ of prohibition and, after considering briefs and argument, upheld the position of the lower court. Lee then filed a petition for a writ of habeas corpus and a suit under 42 U.S.C. § 1983 in federal district court in an attempt to enjoin the state from proceeding with the surgery.

The district court, agreeing that there was virtually no risk of harm to Lee under the circumstances as then presented, denied all relief on October 15, 1982. Preparations were made to remove the bullet at the Medical College of Virginia (MCV) hospital on October 18. The originally slated surgeon, who had testified at the

initial state hearing, refused to perform the surgery against Lee's will. A second surgeon was designated, and he ordered the standard battery of pre-surgery tests. X-rays of Lee's chest demonstrated that the bullet was much deeper in the chest wall than initially thought; the bullet was now pinpointed at approximately 2.5 centimeters beneath the skin.

The new surgeon decided that the greater depth of the bullet required the use of general anesthesia in the surgery. Lee's counsel was informed of this, and was also informed that MCV personnel had done a work-up on Lee to determine his fitness to undergo general anesthesia. Lee filed a motion for rehearing in the Richmond Circuit Court on the same day (October 18) that he learned of the changed circumstances, claiming that surgery under the new circumstances would violate his fourth amendment rights.

On October 19, the state court (with a different judge presiding) agreed to hold a hearing on the motion on the morning of October 21. Lee's counsel unsuccessfully requested more time to prepare because of the complex and unfamiliar nature of the evidence relating to general anesthesia. When the hearing commenced on October 21, Lee unsuccessfully moved for a continuance on the ground that he had been unable to obtain an independent expert or develop expertise in anesthesiology in the short time allowed for preparation for the hearing. Lee repeated this same objection twice more during the hearing, to no avail.

The state court again ruled that the surgery could proceed, because there was not material change in circumstances, and Lee again proceeded to federal district court to seek relief in the form of a new trial. After detouring to the Virginia Supreme Court to exhaust state remedies

by requesting a rehearing, which was apparently summarily denied, Lee was granted a new hearing by the federal court and given almost two weeks to prepare. At the ensuing hearing in federal court Lee did not present an anesthesiologist, but he did put on a general surgeon who testified about the proposed surgery and the medical risks involved. At this hearing Lee was represented by new additional counsel, retained in the interval, who was familiar with the areas of medical malpractice and anesthesiology. The state declined to present any further evidence to the federal court.

The district court concluded that surgery under the new circumstances, especially the use of general anesthesia and the necessarily greater intrusion into Lee's body, would constitute an unreasonable search within the meaning of the fourth amendment. The court enjoined the state

from taking any steps to recover the bullet involuntarily and issued a writ of habeas corpus of limited scope. The Commonwealth then took this appeal.

Before addressing the merits of Lee's fourth amendment claim, we are faced with the threshold issue of whether the claim should be considered cognizable solely under one or the other of 42 U.S.C. § 1983 and the habeas statute, 28 U.S.C. § 2254 or whether it might properly be cognizable under both. Lee sought relief under both on the basis of the same factual claim, and the district court granted relief under both with different remedies deemed appropriate to the two.

Because of their differing and, in critical respects, conflicting procedural and doctrinal regimes, we decline to treat Lee's claim as one potentially entitling him to relief under both theories. We view Lee's claim as being most directly

one seeking to enjoin persons acting under color of state law from depriving a citizen of the United States of a right secured by the Constitution, a claim properly treated as one grounded exclusively in § 1983. We do not consider it properly cognizable in the alternative or in parallel under the habeas statute, 28 U.S.C. § 2254. Because the question is consider it properly cognizable in the alternative or in parallel under the habeas statute, 28 U.S.C. § 2254. Because the question is concededly one not free of doubt and because it resolution might control decision here, we pause to give our reason.

Although there may ultimately be an area of limited substantive overlap between § 2254 habeas corpus and § 1983,[2/] the main thrusts of the two are obviously quite different. The former is primarily a vehicle for attack by a confined person on the legality of his custody and the

traditional remedial scope of the writ has been to secure absolute release - either immediate or conditional - from that custody. See Preiser v. Rodriguez, 411 U.S. 475, 484 (1973). Conversely, § 1983 cannot be used to seek release from illegal physical confinement, id. at 475; see also Hamlin v. Warren, 644 F.2d 29 (4th Cir. 1981) (claim under § 1983 for monetary relief for constitutional violation not cognizable without exhaustion as required by § 2254 if favorable judgment would necessarily serve as binding predicate for habeas release). The remedial scope of § 1983 is obviously much broader than is that of habeas corpus, being available to all citizens and other persons without the jurisdiction of the United States, whether "in custody" or not, and affording to sucessful claimants the full panoply of traditional equitable and legal remedies to redress actual or potential deprivations

of constitutional rights under color of state law.

Apart from the differing relief traditionally available under habeas and § 1983, the two remedial statutes are further distinguished by procedures and collateral consequences peculiar to each and, in critical respects, logically incongruent. A contemporary federal habeas petitioner is required to exhaust state remedies and to follow procedural rules that have no § 1983 counterpart. While not generally subject to pleas of res judicata arising from prior state adjudications, he may in respect of fourth amendment claims be foreclosed from habeas relief under Stone v. Powell, 428 U.S. 465 (1976). A § 1983 complainant, on the other hand, while usually not having to exhaust state remedies, see Patsy v. Board of Regents, 102 S. Ct. 2557 (1982), is faced - if he does "exhaust" - with the

general issue-preclusion doctrine of Allen v. McCurry, 449 U.S. 90 (1980), and must also contend with the still uncertain ramifications of Parratt v. Taylor, 451 U.S. 527 (1981) (§ 1983 relief not available where available state remedies afford constitutionally adequate process).

The present case strongly suggest the existence - at least with respect to factual claims of the type here presented - of an essential dichotomy between the two remedies that precludes application of both to the identical factual claim. By litigating the fourth amendment issue in state court, Lee runs the risk of being precluded from relitigating that issue in a subsequent § 1983 action. Allen v. McCurry, 449 U.S. 90 (1980). But if he were able to make the same claim in federal habeas corpus, he would face no such general preclusive effect flowing from state adjudications.[V] The essential

procedural incongruity of the two remedial statutes is thus revealed in the fact that doing what must be done to open the federal courthouse door under § 2254 (laying aside the fact that with respect to fourth amendment claims Stone v. Powell may close it again) can operate effectively to make the entry provided for the same "claim" by § 1983 the means only of a brief and already doomed visit.

Though the essential incongruity is realized procedurally, we believe that it reflects important substantive differences in the two remedies that militate against their pursuit to judgment as alternative or duplicative modes of redress for the same constitutional violation. These differences indeed "demonstrate the continuing illogic of treating federal habeas and § 1983 suits as fungible remedies for constitutional violations." Allen v. McCurry, 449 U.S. at 104 n.34. We therefore think

a judicial election between the two is required - at least before entry of final judgment[4] - in cases such as the instant one where a claimant seeks in the same action to pursue both remedies to judgment on identical facts.

Lee's claim contains no challenge to the propriety of his present confinement, as confinement; indeed, the record demonstrates ample probable cause to detain Lee and try him for the attempted robbery, and that fact will not be affected by the outcome of this suit. Rather, Lee has initiated this civil proceeding, unrelated to the legality of his confinement, to enjoin a state-authorized search that might infringe his fourth amendment rights. We therefore consider his claim to be one now conclusively shown on the record to be exclusively cognizable under § 1983 and we accordingly now limit our discussion to the application of § 1983 to the facts

in issue here.

III

Treating Lee's claim as one under § 1983 confronts him at the threshold with the fact that the Virginia courts have already decided the despositive factual/ legal issues of his federal claim adversely to him. Allen v. McCurry, 449 U.S. 90 (1980), has mandated that collateral estoppel doctrine should apply to attempts by a § 1983 claimant to relitigate issues of fact or law decided adversely to him in state criminal proceedings, subject to the traditional exception, inter alia, that collateral estoppel will not be applied when the party against whom the estoppel is asserted did not have a "full and fair opportunity: to litigate the claim below, id. at 95.

The McCurry rationale for application to § 1983 claims of collateral estoppel doctrine has since been elaborated in

important respects in Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982). Kremer held that when, as here, a federal court is asked to give preclusive effect to a prior state judgment, the federal courts are bound by the statutory directive of 28 U.S.C. § 1738 "to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." Kremer, 456 U.S. at 466.[5] Kremer also fleshed out the McCurry proviso that to have issue-preclusive effect the prior state proceeding must have afforded a full and fair opportunity to litigate: "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full-faith-and-credit guaranteed by [§ 1738]." Id. at 481.

Guided by McCurry and Kremer, we therefore look first to the possibly

preclusive effect of the state court judgments denying Lee the relief he now seeks in federal court under § 1983.

(A)

The first inquiry under Kremer, 456 U.S. at 466, is whether, and to what extent, the courts of Virginia would themselves give preclusive effect to the state court ruling in this case. If the Virginia courts would not give it preclusive effect, we in turn have no obligation to do so: if they would, we must.

The more specific inquiry is the preclusive effect if any that would be given by Virginia courts to a ruling on a Motion to Compel Evidence (which we view as analogous to a suppression motion for purposes of analysis) issued in the preliminary stages of a criminal prosecution. We can find no Virginia decision that has addressed this precise question, nor can we discern a plain answer from

the Virginia decisions dealing more generally with collateral estoppel doctrine.

The general rule in Virginia is that criminal judgments of conviction or acquittal have no preclusive effect in subsequent civil litigation. See Luke Construction Co. v. Simpkins, 223 Va. 387, 291 S.E.2d 204 (1982). This general rule of nonpreclusion, which has been followed in Virginia since 1916, see Prosise v. Haring, 667 F.2d 1133, 1138-39 (4th Cir. 1981), aff'd, 51 U.S.L.W. 4737, 4738-39 (U.S. June 14, 1983) (Discussing Virginia cases), is based upon Virginia's requirement of mutuality of estoppel and its recognition that "the parties in a criminal proceeding are not the same as those in a civil proceeding and there is a consequent lack of mutuality." Smith v. New Dixie Lines, 201 Va. 466, 472, 111 S.E.2d 434, 438 (1959) (citing cases). Although the Virginia Supreme Court has

been invited several times in recent years to discard this general requirement of mutuality, it has specifically declined to do so. See, e.g., Nero v. Ferris, 222 Va. 807, 284 S.E.2d 828 (1981); Norfolk & Western Railway v. Bailey Lumber Co., 221 Va. 638, 272 S.E.2d 217 (1980).

These general rules of non-preclusion and mutuality in respect of criminal judgments are apparently not absolute, however. Virginia has recognized at least one narrow exception - a convicted arsonist has been held precluded by the conviction from suing on a fire insurance policy insuring the building he burned. Eagle, Star & British Dominions Insurance Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927).[6] And there is some recent indication that the mutuality requirement will be more rigorously applied to situations involving the use of offensive collateral estoppel, see Norfolk & Western Railway v. Bailey

Lumber Co., 221 Va. at 641-42, 272 S.E.2d at 219-20, than to those, such as in the instant case, where the doctrine would be invoked defensively. Indeed, the Virginia Supreme Court has recently stated that mutuality is not to be applied "mechanistically," and that non-mutual defensive preclusion may be appropriate when it it "compellingly clear" that the estopped party previously had a full and fair opportunity to litigate the issue. Bates v. Devers, 214 Va. 667, 672 n.7, 202 S.E.2d 917, 921 n.7 (1974).

In addition to their generally uncertain implications for the mutuality requirement, none of these Virginia decisions dealt with the exact situation confronting us here. We do not have a criminal judgment of acquittal or conviction by adjudication or guilty plea, but rather an order based wholly upon a pretrial ruling on a fourth amendment issue. There

are, in consequence, still other uncertainties about the present state of Virginia law on collateral estoppel in the context of this case. There is a possible question of the "finality" of this order for res judicata purposes, though no question of its finality for purposes of direct appeal in the state proceedings was raised by the parties or by the Virginia courts sua sponte. There is also a question - unresolved in the Virginia courts so far as we are aware - whether the federal defendants here might be considered sufficiently in privity with the state in the state criminal prosecution to overcome any lack of mutuality that would otherwise prevent issue preclusion under state law.

Our resulting uncertainty about how the Virginia courts would resolve the preclusion issue, if presented to them directly, makes us hesitant to rest

decision here on any conclusion that Virginia would or would not ordinarily give collateral estoppel effect to such an order. But cf. Haring v. Prosise, 51 U.S.L.W. 4739 n.10 (reasonable interpretation of Virginia law is that a state criminal conviction has no preclusive effect in § 1983).

Assuming therefore, without deciding, that the state court order here on the Motion to Compel Evidence would ordinarily be given preclusive effect by Virginia courts, we nevertheless decline to give it such effect in this case. Under § 1738, we are required to give state proceedings full faith and credit only if - all other state law predicates for issue prelusion being present - those proceedings satisfy the minimum procedural due process requirements of the fourteenth amendment. Kremer, 456 U.S. at 481-82.[7/]

We hold that Lee was denied procedural fairness here, in that, despite several

pleas for continuance, he was given insufficient time in the state court proceedings to prepare an important and technically complex issue of constitutional dimension.

Powell v. Alabama, 287 U.S. 45, 71 (1932), established that states are required by the fourteenth amendment to provide criminal defendants sufficient time to prepare their defense. Rulings on motions for continuance sought for purposes of defensive preparation are usually within the sound descretion of the trial court, Shirley v. North Carolina, 528 F.2d 819 (4th Cir. 1975), but the denial of a request for more time constitutes a violation of due process if it arbitrarily and unfairly hinders the defendant's ability to present his case. The Supreme Court, in Ungar v. Sarafite, 376 U.S. 575, 589 (1964), addressed the issue:

> The matter of continuance is traditionally within the descretion of the trial judge, and is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

(Citations omitted.)

As Ungar points out, not every abusive denial of a continuance amounts to a due process violation. To determine whether denial of continuance had that unconstitutional effect courts must assess whether the defendant was nevertheless

afforded a reasonable time to prepare a defense and an adequate opportunity to call witnesses, see id. at 589 n.9; the diligence of counsel in requesting the motion and in attempting to procure evidence in a timely fashion, see Shirely, 528 F.2d at 822; and whether unobtained evidence would have been materially helpful to the party or merely cumulative, see Hicks v. Wainwright, 633 F.2d 1146, 1149 (5th Cir. 1981).[8] Because a claim in federal court of fundamental unfairness in state proceedings is a serious and sensitive one, we review the record at this point in some detail.

Lee's counsel filed a motion for rehearing on October 18, the day he was informed of the changed circumstances regarding the removal of the bullet. On October 19, the Richmond Circuit Court ordered that a hearing on the motion be held two days thence, on October 21.[9]

Lee unsucessfully requested more time to prepare. On October 20, Lee requested that three doctors at MCV be subpoenaed to appear at the hearing. These doctors, two surgeons and an anesthesiologist, were engaged by the Commonwealth in connection with the removal of the bullet.

During the two-day period allowed for preparation of the motion, Lee's counsel was able to review the medical record, interview briefly two of the three doctors who had been subpoenaed (including the anesthesiologist),[10] do some preliminary medical research, and make initial contact with an independant anesthesiologist. We are satisfied from the record that counsel was not able, despite obviously diligent effort, to obtain an independant review of the medical record by outside physicians nor was he able to consult with the independent expert in anesthesiology in order to prepare a presentation on the

risks of general anesthesia.

On the morning of the hearing, Lee's counsel requested a continuance because he felt "totally unprepared" to examine the anesthesiologist from MCV and because he had not had an opportunity to consult with an independent anesthesiologist in order to put together a congent presentation. In response, the state court stated flatly that the hearing would proceed promptly as scheduled. Counsel put on the anesthesiologist who had done the work-up on Lee and also put on the surgeon who had refused to proceed with the involuntary surgery.

At the end of this evidence, just prior to the lunch recess, counsel again requested more time in order to obtain independent expert advice on the use of general anesthesia. He again stated that he had been unable to procure expert help because of time constraints and further that he was unhappy with the

testimony of the expert anesthesiologist, who was employed by the Commonwealth. The court, after determining that Lee did not have an expert available, stated that if an expert could be found, "we will hear him at two o'clock if you have him; otherwise we'll hear your argument."

When court resumed at two o'clock, the court asked for any further evidence from Lee. Counsel explained that he had contacted the independent anesthesiologist with whom he had earlier made contact, but that she was unable to be there that day at two o'clock. He had also attempted to contact another anesthesiologist but was unable to do so. Counsel was unable to make a proffer of what the expected testimony would be, because he had not yet consulted them, but requested an opportunity to meet with the anesthesiologists and then present their testimony.

Lee's specific contention of fundamental unfairness is that he had insufficient time to prepare his case and inadequate time to produce his witnesses.[11] We agree with this contention. The case at that juncture presented novel and complex issues with which few attorneys would be immediately familiar. There had been several rounds of hearings before this time, and counsel could be expected to be familiar with the issues raised there, but the events of October 18 injected new and crucial issues into the case - the effect of the greater depth of the bullet and resulting need to use general anesthesia.

There is not, and cannot be, any suggestion that counsel was less than diligent in attempting to put together his case. Two days is short time to accomplish what in fact was done. The record also demonstrates that counsel

made timely and repeated requests for more time. The record does not disclose any reason why more time was not granted, except that the time of the compelled hearing was the time previously set for the actual trial of the case.

Nor does the record indicate why the state court denied counsel adequate opportunity to consult with an independent expert in order to gain some expertise and to present the expert's testimony if appropriate. The court indicated that there was no reason to believe that the anesthesiologist who testified was less than believable, but we think this misses the mark. The denial of adequate time to consult with an independent expert infringed a basic right of Lee's - the right to receive <u>meaningful</u> assistance of counsel. This is especially true in a case like this, involving a complex medical issue that is beyond the immediate ken of most lawyers

and that can only be illuminated for counsel by consultation with experts in the field. Although the anesthesiologist who did testify under subpoena for Lee was no doubt truthful, he was employed by the state - Lee's adversary in this proceeding - and counsel indicated his belief that this expert's testimony was incomplete. To deny Lee the right to consult with and present suitable independent expert witnesses deprived him of a fundamental resource for adequate representation in the adversarial proceeding he faced.

A review of the presentation by Lee's counsel in the federal district court demonstrates that the state court's denial of more time to prepare and consult experts had an adverse effect on Lee's ability through his state court counsel to present his case in state court. Lee retained second counsel, experienced in the areas of medical malpractice and anesthe-

siology, to handle the case in federal court. Counsel were given almost two weeks to prepare for this new proceeding. In the federal proceeding Lee presented as an expert witness a general surgeon knowledgeable in the areas of surgery and anesthesiology who was not connected in any way with the state's attempt to retrieve the bullet. Counsel's questioning of this expert was crisp and effective, demonstrating a degree of understanding of the medical/legal issues that any fair reading of the two records will convince was simply not possessed by court counsel a whit - indeed we think his performance under the circumstances was exemplary - to emphasize that federal court counsel was able to give Lee much more effective representation.[12/] The point is simply that the different degrees of effectiveness based upon the manifest differences in depth of understanding and preparation are

the most cogent possible evidence of the degree of prejudice and unfairness resulting to Lee from the state court's denial to his counsel at that time of the opportunity for preparation vouchsafed his federal court counsel.

We conclude that on the peculiar facts of this case, the state court's denial of more time to prepare was "so arbitrary and so fundamentally unfair as to invoke the Constitution." Shirley v. North Carolina, 528 F.2d at 822; see also Hicks v. Wainwright, 633 F.2d at 1149-50. The arbitrary truncation of preparation time deprived Lee of a fair opportunity to determine the crucial factors relevant to his claim and to obtain independent expert witnesses to testify about those factors. This constituted a deprivation of the due process of law guaranteed by the fourteenth amendment, see Ungar v. Sarafite, 376 U.S. at 589 n.9, and rendered the state proceeding constitutionally infirm.

As Kremer indicates, 456 U.S. at 482, neither state nor federal courts may grant preclusive effect to a prior judgment rendered in a hearing conducted without constitutionally mandated due process protections. Because the second state proceeding in this case was so conducted, we give the resulting order no preclusive effect in this § 1983 action. Cf. Bickham v. Lashof, 620 F.2d 1238, 1246 (7th Cir. 1980) (denial of "opportunity for a meaningful hearing" in state court renders state judgment non-preclusive in subsequent § 1983 action).

IV

Unbound by any determinations of fact or law made in the prior state court proceedings, we now address Lee's fourth amendment claim. The fourth amendment insures the right of all people - accused robbers and citizens in the free society alike - "to be secure in their persons

. . . against unreasonable searches and seizures" (emphasis added). The question in this case, simply put, is whether the proposed involuntary surgery under general anesthesia would be so invasive that it would constitute a constitutionally unreasonable search of Lee's person.

While fourth amendment questions are peculiarly fact-specific, and this case is no exception, there is a sufficient body of case law on bullet removal from which we can draw guidance as to general principles. See, e.g., United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (en banc); State v. Allen, 291 S.E.2d 459 (S.C. Sup. Ct. 1982) (discussing cases). The basic principle is that, once the state has demonstrated the relevancy of evidence and the inability to obtain it otherwise, the reasonableness of removing it forcibly from a person's body is judged by the extent of the surgical intrusion and the extent of the risks to the

subject. See, e.g., Crowder, 543 F.2d at 316.

The authoritative cases have recognized that the controlling principles in this area are those enuciated in Schmerber v. California, 384 U.S. 757 (1966), and Rochin v. California, 342 U.S. 165 (1952).[13] Schmerber and Rochin essentially demonstrate the terminal points on the range of permissible and impermissible police practices in body searches of the type here in issue. Schmerber, upholding the admissibility of test results done on blood involuntarily removed from a defendant, cautioned that only minor intrusions on the sanctity of the individual would be permitted:

> The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States' minor intrusions into an individual's body under strigently limited conditions in

> no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

384 U.S. at 772. At the other end, the Rochin Court, in condemning the use of stomach-pumping to extract evidence, instructed courts to exercise their judgment in scrutinizing police practices "in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses." 342 U.S. at 169 (quoting Malinski v. New York, 324 U.S. 401, 416-17 (1945)).

The task here, in assessing the state's request to proceed with the surgery, is therefore to determine whether this is a minor intrusion permissible under Schmerber or whether it is beyond the pale of permissible police intrusions and thus condemned by Rochin. We conclude that under

the facts of this case the intrusion is so extensive and generates such risk and uncertainty that the surgery cannot be allowed to proceed. Unlike the procedure in Schmerber, which presented "virtually no risk, trauma, or pain," 384 U.S. at 771, the procedure in this case has the potential to inflict all three.

The medical experts in this case agree that the bullet in Lee's chest normally would not be removed, but would be left in the chest indefinitely. The bullet is lodged approximately 2.53 centimeters deep in muscle tissue in the chest, and would require an incision of 5 centimeters to permit extraction. One surgeon testified that it is difficult to discover the exact location of foreign bodies in muscle tissue, and this difficulty could require extensive probing and retracting of the muscle tissue. This surgical penetration of the chest muscle tissue carries with it

the concomitant risks of injury to the muscle as well as injury to the nerves, blood vessels and other tissue in the chest and pleural cavity. Of course, the greater intrusion and the larger incisions increase the risks of infection.

Beyond the extensive nature of the physical intrusion itself, there must also be taken into account the fact that the procedure will require administration of general anesthesia.[14/] Medical experts testified that Lee was a good candidate for general anesthesia and in fact had been subjected to it previously. The experts also testified that the general risks of harm or death from general anesthesia are quite low, and that Lee was in the statistical group of persons with the lowest risk of injury from general anesthesia.

Though the specific physical risks from putting Lee under general anesthesia may therefore be considered minimal, it

bears contemplating what this procedure itself involves when imposed involuntarily upon any citizen in our free society whatever his general physical condition may be. Lee - or anyone else - would, on the undisputed medical testimony in this record, have first to undergo a battery of preliminary testing in order to have the anesthesia properly administered. He would then be injected with a sedative - probably morphine - in order to relax him. Next, he would be given sodium pentathol, a barbiturate, in order to put him to sleep. While unconscious, he would continuously receive a gaseous mixture of oxygen and nitrous oxide to insure that he remained asesthetized. An anesthesiologist would be present at all times to insure that he was breathing properly and that all other vital functions were normal, a necessary medical precaution because all anesthetics have the potential to depress vital functional.

While the statistical risk of actual physical harm to Lee from all this is perhaps very low, the actual risk is of course unknown. This uncertainty in computing the risk is compounded by the disagreement among the medical experts about the exact nature and scope of the operation. For example, one surgeon testified that the procedure, excluding the anesthesia, would take only 15-20 minutes; another surgeon predicted the procedure could take up to 2-1/2 hours to complete. An expert testified that there was virtually no risk of muscle or tissue damage; another stated that these problems were possibilities. Several doctors testified that the procedure would be considered "minor surgery"; another doctor claimed that there was no such thing as minor surgery.

We agree with the district court that a medical designation of this procedure as

minor surgery is not controlling, because "there is no reason to suppose that the definition of a medical term of art should coincide with the parameters of a constitutional standard." Lee v. Winston, 551 F. Supp. 247, 260 (E.D. Va. 1982). The judicial inquiry is not to make the medical estimate in medical terms, but is whether, under the totality of the circumstances presented, the procedure proposed by the state is constitutionally unreasonable. Viewed starkly, the state proposes to drug this citizen - not yet convicted of a criminal offense - with narcotics and barbiturates into a state of unconsciousness, then surgically to open his chest and there to explore for a bullet that may or may not be probative in the trial of the crimes with which he is charged.[15/] We hold that this goes beyond the police practices which the state can legitimately undertake within the bounds of the fourth amendment.

As recognized and insured by that amendment, our people prize the freedom from unreasonable government intrusions upon bodily security and personal privacy as highly as any right or liberty that we enjoy. The proposed surgery is too intrusive and presents too great a risk - to this defendant and to the privacy interests of a free society - to be condoned as permissible police practice in enforcing the criminal laws.

In sum, we agree with the district court's evaluation:

> The procedure contemplated here goes far beyond the prick of a needle in Schmerber, the slight intrusion in Crowder, and the minor procedure orginally supposed to be required in this matter. The Commonwealth proposes to forcibly subdue petitioner by injection, make a substantial incision into his body, retract muscle tissue in an attempt to locate the subject bullet, and if successful in

> locating it, extract it from his body. All of this is to be done where the procedure is concededly not medically necessary for the preservation of petitioner's life and health. Considering the scope of the intrusion, the risks involved, and the affront to petitioner's dignity, the Court concludes the procedure contemplated is more akin to the impermissible activity in Rochin than to the minor intrusion in Schmerber. In short, "These are methods too close to the rack and the screw to permit of constitutional differentiation." Rochin v. California, 342 U.S. at 172.

551 F. Supp. at 261.

V

In conclusion, we summarize.

Lee's request to enjoin the proposed surgery is properly treated exclusively as a claim under § 1983 to protect against the deprivation of a constituional right. Because Lee did not receive a full and fair opportunity to present his claim in state

court, the federal courts are not bound in this action under § 1983 by the prior state court ruling adverse to his claim of right. In assessing de novo Lee's claim of constitutional deprivation, we agree with the judgment of the district court that the proposed surgical procedure would constitute an unreasonable search in violation of Lee's fourth amendment rights. The judgment permanently enjoining the defendants and their agents from proceeding with the surgery must accordingly be affirmed. Because the claim was not properly cognizable as a petition for habeas corpus under 28 U.S.C. § 2254, the district court's order granting the writ must be vacated.

IT IS SO ORDERED.

2

Whether a precise substantive dividing line is ultimately to be drawn between habeas and § 1983 or whether a degree of overlap in respect of challenges to conditions of confinement is inherent in the two is a question not yet definitively resolved by the Supreme Court. Some lower courts hold that habeas lies to correct such conditions, see, e.g., Albers v. Ralston, 665 F.2d 812 (8th Cir. 1981), while others have held that this is the exclusive domain of §1983, see, e.g., Cook v. Hanberry, 596 F.2d 658 (5th Cir. 1979).

In Preiser v. Rodriguez, 411 U.S. 475, 499-500 (1973), the Court recognized that the question was an open one but specifically declined to lay down firm boundaries between habeas and § 1983. More recently, the Court has stated that "we leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the conditions of the confinement itself." Bell v. Wolfish, 441 U.S. 520, 527 n.6 (1976). Because we think that the challenge here is neither to the fact, the length, nor the "condition" of Lee's confinement as the last term has been applied, we are not required to answer that open question here.

3

In view of our determination that Lee's claim here should be construed as one cognizable only under § 1983, we have no need to consider whether his claim, constued as one for habeas relief, would be foreclosed by the Stone v. Powell principle though not by general principles of res judicata. We observe only that the

question would be an open one. The fourth amendment issue here was not litigated in application of the exclusionary rule to evidence already obtained by search, but in determining whether a search might be made. The Stone rationale is of course rested largely upon the conclusion that relitigation of fourth amendment claims in federal habeas proceedings is not likely to have prophylactic effect on police conduct - the basic justification for the exclusionary rule. Whether that rationale applies as well to a pre-search adjudication of fourth amendment issues is a question that can be reserved for another day.

4

Inview of the uncertainty that still obtains in drawing a clear substantive line between the two remedies, claimants should no more be forced to any procedural "election of remedies" here than in other situations. See Fed. R. Civ. P. 8(e)(2). Factual development may be required in close cases to determine the statute under which a particular claim is cognizable, if cognizable under either. As in other contexts, judicial "election" may be deferred to the point of judgment. Obviously, the "label" put by a claimant upon a statement of claim is, in any event, not conclusive upon the court in assessing whether it is legally cognizable as the one or the other. See, e.g., Hamlin v. Warren, 664 F.2d 29 (4th Cir. 1981).

5

The Kremer Court clarified the source of the res judicata effect of state court judgments as being wholly statutory: "It has long been established that § 1738 does

not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments." 456 U.S. at 480-81. After Kremer it appeared settled that there was no independent law of federal res judicata applicable to state court judgments, but that § 1738 preempted the matter by its command that federal courts treat state judgments as would other courts in the state rendering judgment, i.e., according to the state law of res judicata. More recently, however, the Supreme Court in Haring v. Prosise, 51 U.S.L.W. 4736 (June 14, 1983), intimated that some issues, though fully adjudicated and thus preclusive under action. Id., at 4739. See infra n.7.

6

Heller has always been considered by the Virginia courts to be simply a special exception to the general rule against preclusions in respect of criminal judgments. See Haring v. Prosise, 51 U.S. L.W. 4736, 4739 n.10 (June 14, 1983). But a recent Virginia Supreme Court case has cited Heller, in discussing exceptions to the mutuality requirement, with the following parenthetical: "(exception justified, doctrine [of collateral estoppel] invoked defensively)." Lake Construction Co. v. Simpkins, 223 Va. 389, 291 S.E.2d at 205.

7

Under Kremer, we should first inquire whether Virginia courts would decide there had been so insufficient and opportunity to litigate the issue that, while not necessarily unconstitutional, the judgment would not be recognized by other state courts. Our research has revealed no Virginia case law on this issue. The Virginia Supreme Court did review the

state court order on one occasion and declines to rehear it a second time. We do not know from the record whether that court was presented with the specific claim of insufficient opportunity to litigate. In the absence of such an indication, we are reluctant even to assume a difference of view on the matter between our court and the Supreme Court of Virginia if the latter court had been presented with the same challenge we consider. For purposes of decision in this case only, we assume, arguendo, that the state court would have rejected, as a matter of state law respecting the enforcement of judgments, such an attack upon the order here in issue. We do so only because we could not in fairness to the state court rest decision here on a contrary assumption.

We note that Kremer's mandate is to give state judgments preclusive effect unless the state proceedings did not accord the participants minimum procedural due process; if minimum due process was not so accorded, the state courts themselves could not give preclusive effect to the prior state determination. Recently, in Haring v. Prosise, 51 U.S.L.W. at 4739, the Supreme Court intimated that there are certain cases where relitigation of issues in a federal § 1983 action is permissible, even though those issues would be given preclusive effect by the state courts. We think this area of permissible relitigation as yet too undefined to be a proper ground for decision, and we need not explore the issue because of our holding that due process was not accorded in this proceeding.

8

While the cited cases are post-conviction habeas cases, they are applicable to the present case on the issue of whether

a constitutionally sufficient time to prepare was granted.

9 The record indicates that October 21 was chosen simply because that day had earlier been set for the trial on the merits. A "myopic insistence upon expeditiousness" was the specific vice identified in Ungar, 376 U.S. at 589, as the cause of unfairness.

10 Counsel did interview, on October 20, the anesthesiology expert who had done the anesthesia work-up on Lee. This expert had not seen the X-ray of Lee taken on October 18 at the time he did the work-up, and he concluded that a local anesthetic would suffice for the job. The expert subsequently saw the X-rays, but Lee's counsel was able to speak with him about the new circumstances for only a short time on the morning the hearing was held.

11 The defendants would make much of the fact that Lee did not subpoena the independent anesthesiologist he had contacted during the two-day preparation period, although he did subpoena three doctors from MCV who were working on the case. They also point out that Lee's counsel did not make an offer of proff concerning his independent expert's testimony. These contentions largely miss the point. Lee's claim was that he had insufficient time to consult with an expert in order to prepare his case properly. We find it neither suprising nor legally significant that Lee's counsel did not subpoena the witness or make an offer of proof when he had not consulted with the expert to determine what the important issues were and what the expert's

testimony would be.

12

Defendants contend that Lee's failure to produce an anesthesiologist at the hearing in federal court demonstrates that he was not denied a fair opportunity to litigate in the prior state proceedings by his claimed inability to present an anesthesiologist there. Again, as with Lee's failure to subpoena the anesthesiologist there. Again, as with Lee's failure to subpoena the anesthesiologist in the state proceeding, this essentially misses the point by construing Lee's objection to the state proceeding too narrowly as going only to his inability to present a specific witness. See supra, note 8.

13

Rochin was decided on "substantive" due process grounds before Mapp v. Ohio, 367 U.S. 643 (1961), had extended the reach of fourth amendment protections to state action. But its standard for gauging the fundmental fairness of bodily intrusions under due process guarantees applies as well to gauging the reasonableness of body searches under fourth amendment guarantees.

14

We assume - as we must on the record presented - that general anesthesia would definitely be used in the surgery if allowed to proceed. The surgeon designated to do the surgery has stated that he will operate under general anesthesia, and the parties all agree that general anesthesia will be used.

15

A forensic sciences expert testified

that the bullet may be unidentifiable, even as to caliber, if it is removed from Lee's chest. A bullet inside the human body deteriorates, the rate of deterioration dependent upon the time the bullet is inside the body and also upon the body chemistry of the wounded person. This deterioration can also be hastened if the wounded person takes medication. Also, lead bullets deteriorate much more rapidly than other kinds; the bullets fired from Watkinson's gun were determined to be solid lead. The bullet has already been in Lee's chest for approximately nine months.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

I

Schmerber, infra, has decided that an involuntary intrusion, made under protest, and even unaccompanied by court order or other process, into the human body is not necessarily a violation of the Fourth Amendment protection against unreasonable searches and seizures from the person. What we have to decide is whether a perfectly routine surgical procedure to extract a bullet nine-tenths of an inch below the surface of the skin imbedded in the deltoid muscle near the left collarbone violates the Fourth Amendment when accomplished under a general anesthetic.

Among the many remarkable things about this case is the fact that the most nearly controlling authority is Perez v. Ledesma,

401 U.S. 82 (1971), which is nowhere mentioned in the opinion of the majority. Neither is the allied case of Younger v. Harris, 401 U.S. 37 (1971). While the explanation may be that the Commonwealth did not rely upon those cases in its brief, the doctrine of federal courts not interfering in ongoing state criminal prosecutions is so firmly imbedded in our jurisprudence that a decision authorizing such interference cannot be said, I think, to have been considered fully without stating the authority for its action. Absent judicial authority, 28 U.S.C. § 2283, literally read, of course would bar a federal court from staying the state court criminal proceeding, although Younger did not proceed on that premise, 401 U.S. at 54. Even considering that suits under § 1983 have been held to be excepted from the prohibition of § 2283 in Mitchum v. Foster, 407 U.S. 225 (1972), Perez, like Younger, did not rely

upon § 2283 for its authority. Rather, as its reason for reversing injunctive interference with an ongoing state criminal prosecution, it described a federal court's suppression of evidence in a pending state criminal prosecution: "It is difficult to imagine a more disruptive interference with the operation of the state criminal process short of an injunction against all state proceedings." 401 U.S. at 84. And Perez differed factually from the case at hand only to the extent that in Perez the evidence previously seized by the state (obscene literature) was sought to be suppressed, while here it is the very search itself. So the rule of the Perez case must be followed or else the disruptive interference with the operation of the state criminal process may not be authorized in any event.

Perez, in discussion, gave the rule

for an occasion permitting such interference as follows: "Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction or perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate." 401 U.S. at p. 85. There is no harassment in this case, and no prosecution undertaken by the Commonwealth without hope of obtaining a valid conviction. Thus, we must have, to permit relief, "extraordinary circumstances where irreparable injury can be shown." The irreparable injury of course cannot be the mere fact of a criminal prosecution. Younger, p. 46-47. And it cannot be the mere intrusion into the body. Schmerber v. California, 384, U.S. 757 (1966). As a matter of law, then, the extent of the intrusion must decide whether

or not the injury is irreparable, and I think the standard is the same whether the case be considered under § 1983 or as one in habeas corpus.

II

Before passing, I should note that I do not agree that Lee did not have a full and fair opportunity to present his case in the state court. The majority, as did the district court, bases the lack of full and fair opportunity solely on the failure to grant a continuance to get another anesthesiologist to, and prepare for the testimony at, the hearing. The attorney involved at the time of the second hearing in the state court had been employed in the case for more than ten weeks. Remembering that the hearing in question was on October 21st, the attorney had told the court on August 11th that he had completed his investigation

of the facts of the case but had not completed researching the law, and he asked for and was given a continuance of two weeks at that time for that purpose. He had already appeared at the first hearing in the state court and at a subsequent hearing in the district court, and in the Virginia Supreme Court, with respect to the very matter at hand. So any suggestion that he was not prepared as to the law of the case is so patently without merit that I take no stock in it whatsoever.

So far as being unable to examine or cross examine properly an anesthesiologist, the record speaks for itself, and is an entire contradiction of the fact finding of the majority as well as that of the district court. It is true that the attorney did not have at hand the consulting anesthesiologist he wanted to testify, for whom no subpoena had been issued, and whom he has

been found by the majority and the district court unable to examine or cross examine properly. But he did better than that. He called as a witness Dr. C. Paul Boyan, who must be accepted as the prisoner's treating physician and who had not testified before in the case on behalf of anyone. Dr. Boyan was Professor Emeritus in the Department of anesthesiology in the Medical College of Virginia. Prior to becoming an anesthesiologist, Dr. Boyan had been a field surgeon with the Red Cross during World War II, treating the wounded as a surgeon and was familiar with the removal of bullets. He had performed the function of anesthesiologist in about 100,000 operations and had never lost a patient. To say that Dr. Boyan was vastly skilled and experienced in the exact procedure then in question before the court would be understatement. Not only that, Dr. Boyan had examined the patient and was one of the

anesthesiologists who had been selected to administer the anesthetic at the operation. At the conclusion of the hearing in the state court, the attorney indicated that he yet wished to call an independent anesthesiologist, the one that was unavailable that morning. Yet, he did not even contend to the court that any of Dr. Boyan's answers were not absolutely truthful, and his only objection was that Dr. Boyan couldn't quantify some statistics that the attorney's reading of a text on anesthesiology told him should have been quantifiable. Indeed, the anesthesiologist whom he wanted to call was also on the staff of M.C.V.

The attorney's examination of Dr. Boyan reveals anything but the inadequacy of an unprepared attorney, while decried in terms, necessarily implied by the majority opinion. It was skilled, precise, and correct, and displayed knowledge of the

field in which inquiry was being made. I invite especially the reading of pages H-19 through H-66 of the appendix. The same may be said about his examination of Dr. Mendez-Picon who was called as a witness on behalf of the defendant at the second hearing in the state court. Dr. Mendez-Picon had previously testified for the Commonwealth at the first hearing in the state court. No problem existed with getting a surgeon to the second hearing on behalf of the defendant, for one had been called as a witness but was stopped from attending at the instance of the attorney.

Remarkably, this physician also was on the staff of M.C.V. and was the one designated to perform the operation after Dr. Mendez-Picon withdrew.

As there may be no suit complaining of a statute alleging its constitutional in-

validity unless the plaintiff has been injured by its operation. Ashwander v. TVA, 297 U.S. 288 (1936) (Justice Brandeis concurring at p. 347), it also has to be the law that a due process violation may not be prosecuted unless the complaining party has been injured by not receiving the process he was due. On similar if less exaggerated facts, Unger v. Sarafite, 376 U.S. 575 (1964), held there was no due process violation. Even if the attorney's examination of Dr. Boyan is not adequate to refute such a contention, and I think that it is, then the other facts do. The same attorney at the later hearing in the federal court did not call any anesthesiologist at all, although he had talked to four more by that time (one of whom had been consulted by the Commonwealth and declined to testify) and although he had employed associate counsel described by the majority as experienced in the areas of

medical malpractice and anesthesiology. The setting would not be complete without mentioning that the district court based its critical fact finding "entirely from the transcript of the state court proceedings of October 21." It found that the additional evidence submitted in the federal court was either cumulative or in the case of the X-ray prints incomprehensible.[1] And I note especially at this point that the district judge before making those findings had seen the defendant's only additional witness, a surgeon, and heard him testify. It formed its factual conclusions "looking in the same body of evidence [as in the state court record]."

I thus insist that Lee received all the process he was due in the state court proceeding and that even if the failure to continue the case by the state judge was too peremptory, then Lee was not harmed by

it. The record I think will admit of no other conclusion.

I will, for now, accept the premise of the panel majority and the district court that Virginia courts would give collateral estoppel effect to the finding of the state courts and their premise that Allen v. McCurry, 449 U.S. 90 (1980), would bar reexamination of the issue in a suit under § 1983 if a fair opportunity to try the issue were presented.

A fair reading of the Virginia Supreme Court's order indicates that it is a decision on the merits of the Fourth Amendment claim adverse to the prisoner, and the Commonwealth concedes that at oral argument. If the rule in Stone v. Powell, 428 U.S. 465, 486 (1976), is that no Fourth Amendment claims will be considered in federal habeas corpus collateral review of state

searches, rather routing all of them through the state courts and then to the Supreme Court of the United States, then the failure of the petitioner to ask the Supreme Court for a stay of the Virginia Supreme Court's order and to petition for certiorari would mean that an inferior federal habeas court may not consider the merits of the claim. The prisoner was no farther away from an appointment to consider the merits of the claim. The prisoner was no farther away from an appointment to consider a stay of the Virginia Supreme Court's order than the nearest telephone. When, however, we consider that Stone placed emphasis on the lack of deterrent effect on officers by collateral federal post conviction review, months or even years later, then this underpinning of Stone is not present in this case, and federal habeas corpus review

might not be barred by that decision. I think that so far as a claim of intrusion into the human body is concerned, properly presented and developed before conviction, as here, that the Supreme Court would decide that Stone v. Powell did not bar federal habeas corpus review of that question and apply it on those special facts only to post conviction review of the same subject matter.

I agree in part with the district court, however, in its analysis of the habeas corpus question and not with the panel majority. Lee has exhausted his state remedies by the decision on the merits by the Virginia Supreme Court. I accept the analysis of the district court that custody for one purpose is not necessarily custody for another and being held in jail to answer for a

crime and also submit to involuntary surgery. I also accept the analysis of the district court that the only fact finding of the state court which carries with it the presumption of correctness under § 2254 is that there was no material difference in the facts brought out at the first and second hearings in the state court. I also will accept its conclusion that the facts are different. The bullet at the second hearing was shown to be slightly less than an inch deep, while at the first hearing the depth it was imbedded in Lee's muscle tissue was thought to be about two-tenths of an inch deep. The requirement of a general anesthetic was indicated only at the second hearing. So whether there was any difference in risk in removal of the bullet some seven-tenths of an inch

deeper was the proper subject of analysis by the district court, I think, for the risk to the one being operated on is what must be analyzed under the cases in order to ascertain whether or not to permit the intrusion into the body by way of surgery.

Where I part company with the district court as well as in the analysis of the same subject matter by the panel is that neither opinion analyzes the risk to the patient as I will develop below.

III

As the rehearing in the state circuit court, the hearing with which we are principally concerned, Dr. Mendez-Picon,who

up to that time had been Lee's attending physician, testified that his earlier palpation had not revealed correctly the precise location of the bullet. In preparation for the surgery at MCV, the hospital had been able to localize the bullet by taking X-ray photographs of Lee's shoulder, with a lead marker placed on his skin. The bullet had been localized 2.5-3.0cm. into the deltoid muscle. The bullet lay deeper but higher than he had previously thought. As a result of the localization, Dr. Mendez-Picon could state that he knew the bullet was 5.0-6.0cm. away from the pleural cavity, farther away from that cavity than it was thought to be on the basis of the clinical examination.

Dr. Mendez-Picon testified that under the new facts proposed surgery would be a simple, minor procedure, which would take less than one-half hour. There were no

foreseeable complications, and any bleeding would be minimal. Dr. Mendez-Picon stated that surgical removal of the bullet would not result in any permanent impairment to Lee's arm or shoulder.

Dr. Mendez-Picon explained that the decision to use local or general anesthesia is solely within the province of the surgeon. Dr. Whitley, the surgeon who had replaced Dr. Mendez-Picon, decided, as a result of the depth of the bullet, to remove the bullet under a general anesthesia because the surgery would be safer under general than under local. Dr. Mendez-Picon concurred in Dr. Whitley's decision; the proposed surgery would be less risky and involve fewer complications under general anesthesia because it would proceed more smoothly. Dr. Mendez-Picon explained that under general anesthesia the patient's muscles are more relaxed and the patient

experiences less pain. Under local anesthesia the muscles would contract when the patient felt pain, making extraction of the bullet and any fragments more difficult. The relaxed state of the patient's muscles under general anesthesia allows retraction of muscle tissue and exposure of the bullet to be accomplished more easily: ". . .anything that does not have to be cut is not cut."

In trying to estimate the risks involved in the proposed surgery, Dr. Mendez-Picon stated that the lack of similar cases prevented him from giving a certain figure on the chances of injury or complications. Without giving an exact figure, he said that the chances of injury, permanent or temporary, from removing the bullet surgically are very small.

The risks of anesthesia aside, the

the risk from the surgery was a little bit greater than before because the bullet was deeper than he had first supposed and the chances of infection and nerve damage are a little bit greater. Dr. Mendez-Picon estimated that the chance of injury from surgery was double that of before. Whereas before the risk was 1/100,000, now the risk might be 1/50,000. Elsewhere in his testimony, Dr. Mendez-Picon characterized the risk of dying from the surgery itself as being very small, in the order of one chance in 100,000.

Because the proposed surgery now would cut more deeply, it carried a greater possibility of nerve damage. Nerve damage would result in temporary tingling or numbness in Lee's arm. If a nerve were cut, it would, however, regenerate. Dr. Mendez-Picon testified that the chances of the nerve being cut were very small, and, as men-

tioned, even smaller with general anesthesia because the relaxed state of the muscle tissue allows the surgeon to see the nerves more clearly. Dr. Mendez-Picon testified that a one percent risk of harm in medicine is considered substantial; a risk less than one percent would thus be insubstantial. Therefore, the only evidence in the record on which the district court relied admits of only one conclusion, namely, that the risk of the surgery is clearly insubstantial.

While admitting that his expertise lay outside the field of anesthesiology, Dr. Mendez-Picon opined that the risk of general anesthesia carries a higher risk than that of local anesthesia. Nevertheless, he would usually recommend general unless the patient faces a particular risk due to previous conditions, such as cardiac or pulmonary problems or old age. Surgery

under general anesthesia is more comfortable for the patient, and most surgery is done under general anesthesia in spite of a slightly higher risk from the anesthetic even if the patient is older, because the general anesthesia reduces the stress and pain involved. Dr. Mendez-Picon's testimony thus establishes that although in the abstract general anesthesia may involve slightly greater risks than local, those risks may be offset by the decrease in risk where, as here, the general anesthesia makes the surgery itself proceed more smoothly and safely. Dr. Mendez-Picon testified that the use of general anesthesia in minor surgery is commonplace. The outpatient department of MCV routinely uses general anesthesia; the patient receives the general anesthesia at 10 a.m., and he is ready to go home at 3 p.m.

Lee also called as his witness, Dr. C. Paul Boyan, the physician previously mentioned, Professor Emeritus in the Department

of Anesthesiology at MCV. At the request of the Department of Surgery, Dr. Boyan performed an examination of Lee to determine the risks to Lee of using anesthesia. Dr. Boyan read Lee's charts and talked with, and examinaed, Lee. He found that Lee was in good health, had had two previous anesthetics, and was a good risk for general anesthesia. Dr. Boyan, whose service as a surgeon during World War II often required him to remove bullets, testified that removing a bullet from a wound such as Lee's was routine and unproblematic. Although Dr. Boyan had not looked at the X-rays of Lee's shoulder, he had palpated the bullet and estimated that it was no more than a few centimeters under the skin. His palpation had thus meant to him that the bullet was where the X-rays ascertained it to be. On the basis of his examination, Dr. Boyan concluded that the bullet could be surgically removed under either local or

general anesthesia.

Dr. Boyan's testimony explicitly addressed the principal concern of the rehearing: what were the new risks injected into the case by the proposal to proceed with the surgery under general anesthesia. Dr. Boyan stated that local anesthesia is usually safer because its use is associated with small, minor procedures, such as the surgery under consideration here, which are over in less than thirty or forty minutes. Dr. Boyan described the findings of a study, conducted at MCV, based on 150,000 patients who have received anesthesia at MCV over the course of 13 years. Taking all forms of anesthesia together, the study showed that the chance of death from anesthesia at MCV is one in 12,000. If children under 12 years are excluded, the chance is one in 14,500. These figures include all patients, 75 percent of whom

are in high risk groups. Dr. Boyan explained that patients are classified in four groups according to risk, and that Lee was in the lowest risk group, group one. Looking at only the good-risk group patients, in groups one and two, the MCV study found that the chance of dying from anesthesia is one in 50,000. Lee's risk would thus be less than one in 50,000. Dr. Boyan quite aptly described this risk as "far fetched." The MCV study, the results of which could not be extrapolated to other hospitals, found that the chances for all groups dying from anesthesia at MCV were roughly equal to the chances of being murdered in the United States within a year or dying in a car accident within 158 days.

Dr. Boyan stated that the MCV study did not, nor could he, statistically quantify the risks of local versus general anesthesia because comparisons had to be

made for one type of surgery and one type of patient. Unlike statistical studies on cars, for example, which are supposed to be built to a single set of specifications, all patients are different, he explained. But for a given type of patient and surgery, assuming the involvement of a competent anesthesiologist, the risk of injury, whether temporary or permanent, or of death is the same for local and general anesthesia.

Lee had also called as a witness Dr. Whitley who was scheduled to perform the surgery. Because Lee primarily wanted Dr. Whitley to testify to his desire to perform the surgery under general anesthesia, to which Dr. Mendez-Picon had already testified, and the state circuit court accepted as stipulated, counsel for Lee decided to proceed without Dr. Whitley. Counsel stated that his main concern was

with the evidence from the anesthesiologist, not from the surgeon, and that his only complaint about Dr. Boyan's testimony was its failure to quantify statistics. Counsel suggested that if he had had more time he could have found an expert who would have been able to give specific statistical risks of harm to Lee. Of course, such evidence was never forthcoming in later federal court hearing when Lee had all the time he wanted to prepare. No anesthesiologist at all testified at that hearing.

The upshot of all of the testimony relied upon by the district court was that the removal of the bullet would be perfectly routine in every way. When questioned about the adverse effects of Xylocaine, for example, a local anesthetic, Dr. Boyan testified that there was no more risk connected with the injection of that

drug into the body than the introduction of any other drug into the body, and he gave as an example Tylenol. I suggest the detailed description of a routine administration of a general anesthetic relied upon in considerable part by the panel for its decision is calculated almost wholly to emphasize the rude insult to the body and to the dignity of the person rather than the risk to the patient. And the same may be said of the district court's less detailed description of the same thing. The same remarks apply to the detailed description of removal of the bullet which only describes a routine surgical procedure.

Thus, I think that unless we are going to establish a rule that the removal of bullets from the person more than skin-deep may not be accomplished under general anesthetic, the risk to the patient is the principal factor which must be considered.

Because the only testimony in the record is that if a patient is uncooperative, then a general anesthetic, rather than a local, should be used, this rule places the determination of whether or not the bullet will be removed entirely in the hands of the prisoner. Therefore, I would not adopt such a per se rule as is bound to be the result of this decision by the majority. Although such a rule is not mentioned in the majority opinion, that result is almost bound to happen, for, artful as the language used may be, the description of the bullet removal is nothing more than of a routine minor surgical procedure under general anesthetic.

It is true that the sensibilities are shocked by an involuntary intrusion into the human body, but it is just as true that they are similarly shocked when a man in an attempted robbery shoots his intended vic-

tim and then is able to withhold evidence of the crime at virtually no risk to himself. Had the assailant only been masked he would certainly go free under the majority opinion. Unless the rule of decision is going to necessarily include how much risk to the patient, and the cases[2] indicate that such should be a principal consideration, decisions in such cases as the one before us will come to be unprincipled holdings. Any surgical procedure is shocking to some, few are shocking to others. The intrusion into the human body at hand shocks the writer, yet I cannot escape the conviction that under Schmerber an analysis of the amount of risk to the patient is necessary in each case.

I submit the majority, as did the district court, has substituted an analysis of the rude insult to the body and to the dignity of the person, for risk to the

patient. I do not believe these cases should be decided on that ground because there is no sufficient stated principle to guide the decisions of the courts. If we are going to have a rule that no bullet may be routinely removed under general anesthesia which is nine-tenths of an inch below the skin, it is better to say so than to recount in detail a routine minor operation and assign as reasons for our decision the known consequences. Any penetration of the skin, of course, involves risk; the question must be how much.

The evidence in this record shows that no analysis has been made of risk to the patient by either the district court or by the panel majority, and while I think there is little or no risk, I believe that matter is more properly entrusted to the district court for initial decision. I further believe that, while the fact that the contem-

plated operation was minor surgery is not dispositive of the case, that factor must be considered in arriving at any decision. Also to be considered is the state proceeding at hand and whether that procedure was fair. I cannot agree that the routine removal under general anesthetic of a bullet imbedded in a muscle nine-tenths of an inch beneath the skin, with virtually no risk to the patient, is per se in violation of the Fourth Amendment. Yet that is the very narrowest holding that the opinion of the majority will permit.

I believe that the statements in United States v. Crowder, 543 F.2d 312 (D.C. Cir.1976), cert. den. 429 U.S. 1062 (1977), supporting the opinion of that court of appeals are well considered. They are: was there any other way to obtain the evidence;[3] whether the operation was major or minor, the precautions taken,

the possible complications and risk; and the extent of adversary hearings prior to conducting the surgery. Crowder at 316.

I would thus vacate the judgment of the district court and remand the case to it for reconsideration under the principles I have set forth just above, taking care that an analysis of risk to the patient must be more than the self-evident proposition that it does exist.

Footnotes:

1. The majority relies on the testimony of the surgeon (a specialist in masectomy we are told) who testified at the second federal habeas corpus hearing to set up inconsistencies in the expert testimony, the principal of which is the length of the operation caused by the uncertainty of the location of the bullet even with X-rays. Dr. Boyan knew exactly where the bullet was even without X-rays the first time he saw the patient. Dr. Mendez-Picon knew exactly where the bullet was with the aid of X-rays, although he had at first mistaken scar tissue for the bullet, which Dr. Boyan had not. The rejection by the district court of this testimony for whatever reason

is well justified by the medical authorities which indicate that the location of bullets by X-ray or CT scan may be precisely accomplished. See, e.g., J. Lee, M.D., S. Sagel, M.D., & R. Stanley, M.D., eds., Computed Body Tomography 496 (N.Y. 1983); J. Haaga, M.D. & N. Reich, D.O., Computed Tomography of Abdominal Abnormalities 270-72 (St. Louis 1978).

2. For completeness, I find the following published cases have considered the removal of a bullet from the human body, not that there may not be others:

United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (en banc), cert. denied, 429 U.S. 1062 (1977); South Carolina v. Allen, ___ S.C. ___, 291 S.E.2d 459 (1982); Doe v. Florida, 409 So.2d 25 (Fla. App. 1982); Hughes v. United States, 429 A.2d 1339 (D.C. App. 1981); Missouri v. Richards, 585 S.W.2d 505 (Mo. App. 1979); Georgia v. Haynie, 240 Ga. 866, 242 S.E.2d 713 (1978); Missouri v. Overstreet, 551 S.W.2d 621 (Mo. 1977) (en banc); Bowden v. Arkansas, 256 Ark. 820, 510 S.E.2d 879 (1974); New York v. Smith, 80 Misc. 2d 210, 362 N.Y.S.2d 909 (1974); Allison v. Georgia, 129 Ga. App. 364, 199 S.E.2d 587 (1973), cert. denied, 414 U.S. 1145 (1974); Adams v. Indiana, 260 Ind. 663, 299 N.E.2d 834 (1973), cert. dunied, 415 U.S. 935 (1974); Creamer v. Georgia, 229 Ga. 511, 192 S.E.2d 350 (1972), cert. dismissed, 410 U.S. 975 (1973).

3. The majority opinion takes the position that a solid lead bullet already lodged in a human body for nine months may not now be probative as to caliber or land and groove marks because of the deterioration of the lead during the delay. (Slip op. p. 31, esp. n. 15). I think this fact finding

is without support in the record or in medical learning. A forensic sciences expert testified that a lead bullet may decompose over time, but carefully avoided specifying the duration that would be necessary. Dr. Mendez-Picon testified that the X-rays show an intact bullet that had retained its cylindrical shape and had a slightly bent nose.

The medical literature reveals that decomposition of a lead foreign body would lead to symptoms of plumbism or lead poisoning. Cagin, M.D., Diloy-Puray, M.D., & Westerman, M.D., Bullets, Lead Poisoning & Thyrotoxicosis, 89 Annals Internal Med. 309 (1978). The deterioration of a lead bullet is a rare phenomenon presumably because the human body readily encapsulates the bullet with dense avascular fibrous tissue. Switz, M.D., Elmorshidy, M.D. & Deyerle, M.D., Bullets, Joints, and Lead Intoxication, 136 Arch. Internal Med. 939 (1976). Dr. Switz has written that the symptons of lead intoxication following decomposition is controlled by the solubility of lead in the body. Id. at 940. Blood serum is a relatively poor solvent, and would in any event have little contact with a bullet encapsulated in avascular tissue. Id. at 941. In Dr. Switz's case study, the first in the English literature, symptoms of lead poisoning appeared only 40 years after a bullet was lodged in the ankle region where the site or the bullet was aggravated by a later injury and thus exposed to increased blood flow and apparently to synovial fluid, which is more corrosive of lead than is blood serum. Id. at 939, 941. The recommendation of Dr. Switz that most bullets need not be removed, obviously because they do not deteriorate, is consistent with the recommendation made here that the bullet in

question need not be removed for the sake of Lee's health. But, the fact the bullet in question will not significantly deteriorate is an uncontradicted proclamation of its probative value.

The matter of the deterioration of the bullet, I think, should be the subject of further evidence on remand if the prisoner desires it. Otherwise, I think the record will support only the conclusion that there has been and will be no significant deterioration during the pendency of the litigation.

OPPOSITION BRIEF

NO. 83-1834

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IN THE

SUPREME COURT OF THE UNITED STATES

October 1983 Term

ANDREW J. WINSTON, ET AL.,

Petitioners,

v.

REGINALD LEE, JR.,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

BRIEF IN OPPOSITION

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January 14, 1984

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QUESTIONS PRESENTED

WHETHER IT VIOLATES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION TO SEIZE THE ACCUSED IN ORDER FORCIBLY, UNDER GENERAL ANESTHETIC, WHICH IS NOT MEDICALLY INDICATED, IN ORDER FOR THE STATE TO RECOVER BULLETIN FINGERS WHICH MAY OR MAY NOT INCRIMINATE THE TESTIMONY OF THE EYEWITNESSES.

IN THE

SUPREME COURT OF THE UNITED STATES

ANDREW J. WINSTON, ET AL.,

Petitioners,

V.

RUDOLPH LEE, JR.,

Respondent.

BRIEF IN OPPOSITION

Rudolph Lee, Jr., by counsel, files this brief in opposition to the petition for a writ of certiorari filed against him by Andrew J. Winston and Aubrey M. Davis, Jr.

STATEMENT OF THE CASE

The factual background here is relatively complex for a case of this nature owing to the fact that it proceeded through the state courts and into the federal system on one set of facts and then re-traced those steps a second time after new dangers to Lee were discovered.

The case is more easily understood if the facts as found by the trial court, Lee v. Winston, 551 F. Supp. 247 (E. D. Va. 1982) (Merhige, J.) appended hereto, are reviewed in conjunction with the opinion of the court of appeals, Lee v. Winston, 717F.2d 888 (4th Cir.1983) (per Phillips, J.), appended to the petition.

SUMMARY OF REASONS FOR DENYING THE WRIT

1. THERE IS NO CONFLICT ON THIS QUESTION AMONG THE CIRCUITS OR STATE COURTS OF FINAL RESORT.

2. THE COURT OF APPEALS CORRECTLY APPLIED THE FOURTH AMENDMENT IN ACCORDANCE WITH THE DECISIONS OF THIS COURT AND OTHER COURTS HAVING CONSIDERED THE QUESTION.

REASONS FOR DENYING THE WRIT

1. THERE IS NO CONFLICT ON THIS QUESTION AMONG THE CIRCUITS OR STATE COURTS OF FINAL RESORT.

Petitioners' attempt to fabricate a conflict between the view taken by the court of appeals in this case and that taken in United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (en banc), cert. denied, 429 U. S. 1063 (1977) (permitting removal of a bullit immediately under the skin). To this end they state: "The Circuit Court referred to the prick of the needle as the terminal point on the range of permissible police practices in body searches." Pts. 16-17. While the court of appeals recognized Schmerber as enunciating the test for constitutionally permissible bodily intrusions, it never intimated that the prick of a needle was the greatest allowable intrusion. It cited with approval both Crowder, supra, and Allen v. State, 277 S.C.395, 291 S.E. 2d 459(1982) (both allowing surgery). In fact, the only mention of the prick of the needle appears where the court of appeals quotes the district court:

> The procedure contemplated here goes far beyond the prick of a needle in Schmerber, the slight intrusion in Crowder, and the minor procedure originally supposed to be required in this matter.

Lee v. Winston, 551 F. Supp. 247, 261 (E.D. Va. 1982), quoted in, 717 F.2d 888, 901(4th Cir. 1983).

Indeed, when it is recalled that the lower courts originally approved the surgery here, before the increased

dangers became known, it is absurd to contend the holding limits bodily intrusions to the prick of a needle.

Of course, the district court and the court of appeals did not ground their decision on the decision of the United States Court of Appeals for the District of Columbia Circuit, which was not controlling, but rather upon the decision of this Court in Schmerber v. California, 384 U.S. 757 (1966) (permitting removal of blood) which was controlling. Nevertheless, the court of appeals cited Crowder with approval, 717 F.2d at 899, and distinguished it as did the district court as involving a bullet in an extremity, much closer to the surface, and which could be removed with only a ten minute procedure under local anesthetic.

As the discussion of the state court cases, deferred until the second argument, will demonstrate, there is a uniform pattern. The courts will recognize the holding in Schmerber that only 'minor intrusions into an individual's body under stringently limited conditions' will be permitted. 384 U.S. at 772. Then the court will address the question in the context of proposed surgery as the court of appeals did here:

> The basic principle is that, once the state has demonstrated the relevancy of evidence and the inability to obtain it otherwise, the reasonableness of removing it forcibly from a person's body is judged by the extent of the surgical intrusion and the extent of the risks to the subject.

717 F.2d at 899, citing, Crowder, 543 F.2d at 316.

Thus, as with most questions of reasonableness, the task becomes a balancing of the particular facts and circumstances of the case. The only difference between Crowder and

the instant case is the factual situation. The two courts applied the same principles to differing facts and, not surprisingly, arrived at different results.

From the very beginning of the petition, (the Question Presented for Review), it is apparent that petitioners are seeking a third review of the record to discover what the district court and court of appeals have not been able to discover, and that is that the proposed search is reasonable. The fact that petitioners' presentation of the single issue covers an entire page because of the laborious detail with which the circumstances are set forth belies petitioners' argument that there is a conflict among the decisions.

2. THE COURT OF APPEALS CORRECTLY APPLIED THE FOURTH AMENDMENT IN ACCORDANCE WITH THE DECISIONS OF THIS COURT AND OTHER COURTS HAVING CONSIDERED THE QUESTION.

Petitioners cite six state court decisions permitting surgery in an effort to show that the result reached by the district court and the court of appeals is not in accord. Each of those cases is factually distinguishable.

Cramer v. State, 229 Ga. 511, 192 S.E.2d 350(1972), cert. dismissed, 410 U.S. 975(1973), one of the early cases, established the principle that the magnitude of the intrusion into the body must be balanced against the need for the evidence. The case involved a bullet on the right side of the chest and the surgery would take "no more than fifteen minutes and with a local and not a general anesthetic." Id. at 352 (emphasis supplied). This was clearly a less intrusive situation where surgery was permitted than is presented here where the surgery would take 30 minutes to two and a half hours and would require

general anesthetic. Similarly the surgery may be permitted where the bullet is "just below the skin" and there was "no danger to life or limb." Allen v. State, 129 Ga. App. 364 199 S. E. 2d 567(1973), cert. denied, 414 U. S. 1145(1974). Of course in the instant case, the fact that the bullet was deeper than just below the skin was the change of circumstances which prompted the district court to reverse its earlier view.

In State v. Allen, 277 S.C. 595, 291 S.E. 2d 419(1982), the bullet was one-quarter inch below the skin and would require an incision of less than three quarters of an inch to remove it under local anesthetic during a fifteen minute procedure. Again, the surgery was allowed in circumstances almost identical to those in this case prior to the newly discovered evidence, but far less intrusive than presently exist. To the same effect are Hughes v. United States, 419 A. 2d 1339 (D.C. Ct. App. 1981) (bullet just under the skin in fatty tissue; one or two sutures to close incision; local anesthetic) and Doe v. State, 409 S. 2d 35 (Fla. App. 1981) (bullet in leg near groin one-half inch below skin; local anesthetic).

State v. Richards, 585 S. W. 2d 505 (Mo.App. 1979) presented a situation where the bullet was lodged four inches into the hip. The court permitted the surgery because the bullet was near no major vascular or neurological systems and the operation was in the best medical interests of the defendant. Id.at 506. Here, on the other hand, the bullet is proximate to the brachial artery and the brachial plexus nerves and surgery is not medically indicated.

Significantly, Allen involved two bullets, the one previously described which was permitted to be removed and another

located under the rhomboid muscle outside the thoracic cavity which was not. The second bullet would require a forty-five minute to two hour procedure under general anesthetic to remove it, and the removal was not medically necessary. 291 S.E. 2d at 662. Clearly, the facts in the instant case more closely parallel the second bullet in Allen. It is significant to note that in evaluating the risks, the court relied upon the dangers of cardiac arrest, pneumonia, and blood clot formation which could arise from the use of general anesthesia. Id.

In short, none of the cases permitting surgery cited by petitioners involved general anesthesia or a procedure as lengthy as that involved here. All of the cases applied the principles announced in Schmerber. In two of the cases, Hinkle and Allen, there were two bullets, in each,one was allowed to be removed and the other was not, thus illustrating how the differing factual pattern will lead to a different result when applying identical principles of law.

The district court and court of appeals weighed the length of the surgical procedure, the length and depth of the incision required, and the general anesthetic to be used, with all of its attendant dangers, against the need for the evidence which may or may not corroborate what one or more eyewitnesses would testify to at trial. Under these circumstances the search is unreasonable.

As the court of appeals pointed out, search and seizure cases are peculiarly fact specific. That is, they rise and fall upon the facts and circumstances of the particular case. The questions here turn only on the facts resolved twice in

favor of respondent and are without impact outside this case. There is no reason for any additional review of this matter.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari of Andrew J. Winston and Aubrey M. Davis, Jr. ought to be denied.

Respectfully submitted,

RANDOLPH LEE, JR.

By: _____
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APPENDIX

Lee v. Winston, 551 F. Supp. 247 (E.D. Va. 1982)
(Opinion of October 15, 1982).....A-1

Lee v. Winston, 551 F. Supp. 247, 253 (E.D. Va. 1982)
(Opinion of November 12, 1982).....A-10

EDITOR'S NOTE

PAGES A-1 thru E-10 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

FILED

OCT 16 1992

CLERK, U. S. DIST. COURT
RICHMOND, VA.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RUDOLPH LEE, JR.,
Petitioner,

v.

ANDREW J. WINSTON, et al.,
Respondents.

Civil Action No.
92-0879-R

MEMORANDUM

This matter came on for hearing on the instant Petition for Writ of Habeas Corpus and petitioner's application for a temporary restraining order, preliminary injunction, and permanent injunction on October 14, 1992. For the reasons set forth below, the application will be denied and the petition dismissed. This Memorandum embodies the Court's findings of fact and conclusions of law.

Since petitioner is in custody in Richmond City Jail pending trial, the Court does not have jurisdiction pursuant to 28 U.S.C. § 2254, as petitioner asserts; that section provides jurisdiction only if the petitioner is in custody pursuant to a judgment of a state court. However, because the petitioner contends that he is in custody in violation of the Constitution, the Court does have jurisdiction over this claim pursuant to 28 U.S.C. § 2241(c)(3). The Court has jurisdiction over petitioner's claim under 42 U.S.C. § 1983 pursuant to 28 U.S. § 1343(3).

I. Factual Background

The facts as they appear from petitioner's pleadings and the transcript of the proceedings[1] in the Virginia trial court may be briefly summarized as follows:

Petitioner has been charged with malicious wounding, attempted robbery, and use of a firearm in the illegal commission of these two felonies.[2] On July 31, 1992, the Commonwealth's Attorney for the City of Richmond filed a Motion to Compel Evidence, seeking to recover a bullet lodged in petitioner's left cheek. The Circuit Court conducted an evidentiary hearing on the motion beginning on July 31, 1992 and continuing on August 3, 5, and 31, 1992. At the conclusion of such hearing, the court entered its findings from the bench, concluding essentially that petitioner had been given a full opportunity to present his claim, the Commonwealth had demonstrated need for the bullet as evidence and could not obtain the same evidence from another source, and removal of the bullet would involve only a minor surgical procedure with virtually no threat of permanent

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injury to petitioner. Tr. 159-60. Accordingly, the Circuit Court granted the Commonwealth's Motion to Compel Evidence, but stayed enforcement of the order to allow petitioner to undertake appropriate appellate review of the matter. Subsequently, on October 12, 1992, the Supreme Court of Virginia denied petitioner's Petition for Writ of Habeas Corpus and/or Writ of Prohibition. Thereafter, petitioner brought the instant Petition for Writ of Habeas Corpus.

II. Issues Presented

Petitioner asserts that the Circuit Court's order sustaining the Motion to Compel Evidence deprives him of rights, privileges, and immunities secured by the Fourth and 14th amendments to the U.S. Constitution. For his habeas corpus claim, petitioner alleges that the order will require additional custody in that he will have to be in custody and restrained by the respondent Sheriff or his agents for the bullet to be surgically removed in a hospital. For his § 1983 claim, petitioner alleges that the conduct complained of was and will be engaged in under color of state law.

As noted supra, the Court held a hearing on October 14, 1992 after notice to respondents. Respondents were present and took part in the hearing; the Court accepted into evidence the transcript and other documentary evidence of the proceedings in the Circuit Court and the Virginia Supreme Court. Accordingly, the petitioner need not satisfy the conditions of Rule 65(b), Fed. R. Civ. P. for an ex parte application for a temporary restraining order, see Reizen v. City of Danville, 937 F.2d 979 (4th Cir. 1991), aff'd mem., 364 U.S. 880 (1960) (per curiam). When such a hearing is conducted, the procedure for considering an application for a temporary restraining order is essentially the same as that on an application for a preliminary injunction, and the distinction between the two forms disappears. See Edwards v. Kiser, 942 F.2d 939 (4th Cir. 1991); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2951, at 449-500 & nn. 81-83 (1973). Were the Court to grant a preliminary injunction to petitioner, respondents might well be deprived of due process, given the brief notice they received. See Reizen v. Transportation Communications Employees Union, 45 F.R.D. 464 (D.D. Miss. 1968). However, even applying the less stringent standard for a preliminary injunction, the Court concludes that petitioner is not entitled to the relief sought.

The standard for a preliminary injunction in the Fourth Circuit is the balance-of-hardship test, whereby the district court's decision must be

> based upon a flexible interplay of the four factors to be considered: (1) the likelihood of irreparable harm to the plaintiff without the temporary injunction; (2) the likelihood of harm to the defendant with the injunction;

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(3) plaintiff's likelihood of success on the merits; and (4) the public interest.

Tolmatic, Inc. v. Bradshaw, 628 F.2d 1025, 1033 (6th Cir. 1980); see Maryland Shipbuilding Co. v. Payne, 603 F.2d 477 (4th Cir. 1979); Blankenbiller Furniture Co. v. Philip Manufacturing Co., 593 F.2d 84 (6th Cir. 1977).

"A future injury of uncertain date and inestimable magnitude is irreparable harm." Phillips v. Chevron Central Petroleum Corp., 660 F.2d 618, 620 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980). In the instant case, petitioner faces a future injury of relatively certain date. The magnitude of the physical injury is also fairly certain--it is expected to be slight--as the Court's discussion infra reveals. The magnitude of the injury to petitioner's dignity from the proposed intrusion into his privacy is not, however, so certain. In sum, the Court concludes that petitioner faces a nominal risk of irreparable physical harm, see infra, and a non-insubstantial risk of irreparable harm to his dignity.

The anticipated harm to the respondents is that they will be deprived of potential evidence at the time of trial on petitioner's criminal charges. The likelihood of such harm is conditioned on several factors now uncertain to varying degrees: whether the object in petitioner's shoulder is a bullet; if so, whether the bullet will be identifiable when removed; if so, whether the evidence will be useful at trial. It is also uncertain whether the delay occasioned by an injunction would cause an otherwise identifiable bullet to deteriorate to the point of being unidentifiable due to the corrosive effect of body fluids. Tr. 10-97. In sum, the Court finds the likelihood of harm to the respondents resulting from an injunction to be uncertain, but not negligible.

The Court will reserve discussion of petitioner's likelihood of success on the merits and consider the element of the public interest. At the risk of stating the axiomatic, the public interest is that justice be done--particularly in petitioner's criminal trial. Recovering and identifying the bullet could serve to exonerate the petitioner. If the bullet amounts to useful evidence for either side, it serves the public interest in justice, since the finder of fact presumably can better reach a just result if given more useful information. On the other hand, nearly 200 years of American jurisprudence under the Bill of Rights support the principle that protecting the rights guaranteed thereto amounts to justice. In sum, the Court cannot conclude that the public interest in justice would be better served by either the granting or the denial of the injunction.

Similarly, consideration of the likelihood of irreparable harm to the petitioner without the injunction and the likelihood of harm to the respondents with

the injunction does not yield a clear indication of the balance of the hardships. Accordingly, the "flexible interplay" of the factors depends heavily on plaintiff's likelihood of success on the merits.

III. Rizzo v. Powell

Before reaching the merits of petitioner's claim that the proposed surgery will violate his fourth amendment rights, the Court must address respondents' contention that Rizzo v. Powell, 423 U.S. 403 (1974), precludes the Court from reaching the merits. That case, of course, limits the substantive scope of federal habeas corpus review, holding that when a state prisoner asserts that the state trial court failed to exclude evidence that the prisoner alleges came from an unconstitutional search or seizure, the federal court is only to inquire into whether the state had provided the prisoner an opportunity for a full and fair litigation of his or her claim. Id. at 480-83.

Both the holding and the rationale of Rizzo v. Powell are very closely tied to the practice and principles surrounding the exclusionary rule. On both occasions when the Court explicitly framed the question presented, it did so in terms of the introduction or exclusion of allegedly tainted evidence at trial. See id. at 489, 489. The holding was expressed in the same terms. See id. at 490 ("[W]e conclude, in light of the nature and purpose of the Fourth Amendment exclusionary rule . . ."); id. at 493-93, 494-95.

In Part III of the opinion, id. at 493-96, the Court traced the history and rationale of the exclusionary rule. "The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights." Id. at 495. The Court concluded that this purpose would not be substantially furthered by federal habeas corpus review of state court convictions, since the connection between the police misconduct and the eventual result would be so attenuated. Id. at 495.

By contrast, the instant petition affords the Court the opportunity to offer guidance to law enforcement officials before they undertake the proposed search. Rather than deciding ex post whether evidence should have been excluded as illegally obtained, the Court can decide ex ante whether obtaining the evidence would be illegal. To borrow the terminology of punishment theory, the exclusionary rule provides at least general deterrence: the theory is that law enforcement officials will be deterred from making illegal searches in other cases because of the result that followed in a particular case. By contrast, in the instant case, the Court can, if necessary, provide special deterrence, as well as general

determination. It can neither the very search in question, as well as guide future searches. Accordingly, the Court will proceed to the merits of petitioner's fourth amendment claim; respondents' assertion is rejected.

III. Fourth Amendment Analysis--Proper Standard

The petitioner rests his claim of deprivation of fourth amendment rights on Schmerber v. California, 384 U.S. 757 (1966). In that case, the Supreme Court approved the taking of blood from the defendant without his consent so that his blood alcohol content could be determined. However, the Court stressed that may "reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we hold today that the Constitution does not forbid the State minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." Id. at 772 (emphasis added). Thus, this Court must determine whether the proposed intrusion would be minor and the proper limiting conditions met.

The Court notes at the outset that the instant case presents a most troubling fact situation. The proposed intrusion takes the form of an incision of about 1.5 centimeters in length to remove an object approximately 0.5 centimeters beneath the skin. (Tr. 59-60). In sheer physical terms, this procedure obviously involves a greater intrusion than that required for the taking of a blood sample in Schmerber. As explained infra, the Court concludes that the particular facts before the Court do not constitute an impermissibly great intrusion under the terms of Schmerber. However, the Court stresses that the instant situation appears to represent essentially the limit to the degree and kind of intrusion constitutionally permissible.

Before proceeding to the Schmerber analysis, the Court notes that in United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (en banc), cert. denied, 429 U.S. 1002 (1977), apparently the only federal case applying Schmerber analysis to a surgical procedure, the court approved a removal of a bullet under conditions very similar to those in the instant case. Petitioner contends that the Crowder court did not correctly apply Schmerber, he derives from Schmerber a four-part test to determine whether an intrusion is unreasonable. The test petitioner proposes represents essentially the most generous to petitioner possible reasonable reading of what Schmerber requires. In the interest of giving full consideration to petitioner's claim, the Court will assume, without deciding, that petitioner correctly characterizes the significance of Schmerber and that Crowder is not

controlling.

V. Fourth Amendment Analysis--Applying Schmerber

As petitioner reads Schmerber, 384 U.S. at 770-71, a court that is deciding whether an intrusion is unreasonable is to examine whether: (1) there was a need for the evidence; (2) there was a clear indication the evidence would be found; (3) the procedure was a minor one with "virtually no risk, trauma, or pain;" and (4) the procedure was reasonably carried out in a hospital environment by medical personnel.

To apply the test, the Court must examine the facts on the record. The medical testimony in the Circuit Court indicated that the proposed surgery would be performed under local anesthetic. The doctor who testified characterized the procedure as "minor surgery." As noted supra, the incision would be 1.5 cm in length and deep enough to remove an object 0.5 cm beneath the surface of the skin. The object is now far from the nerves and arteries, so the chances of harming such structures by the surgery are "almost zero," according to the doctor. He testified that the chance of harming the patient by the procedure was perhaps one in 10,000 or one in 100,000; however, the danger in leaving the bullet, "if it doesn't produce any pain or other problem," is probably zero. Thus, the doctor concluded that it was more dangerous to the patient to remove the bullet than to leave it. (Tr. II-35, 63-72).

Petitioner challenges the first element of the test on the ground that the Commonwealth claims to have an eyewitness (the victim) who will positively identify the petitioner. Thus, petitioner contends that the specific evidence is not needed. Respondents assert that the evidence is necessary to rebut petitioner's claim that the bullet came from a different gun. The Court concludes that the respondents have established a need for the specific evidence. Petitioner does not suggest that there must be a compelling need, and the Court cannot say that there is not any need for it, that it would be merely cumulative.

Petitioner also challenges the "need" element more generally, asserting that the proposed procedure is much more rare than the blood sampling approved as a routine procedure in Schmerber, and that blood alcohol determinations are more necessary to prosecuting drunk driving violations than ballistics determinations are to other types of prosecutions. There is no evidence before the Court to support such assertions. The Circuit Court specifically found the "need" element satisfied, both specifically and generally. (Tr. II-13). It seems at least equally plausible as not that when the procedure is as relatively simple as

the one proposed, a routine practice is to undergo the surgery, even if that is slightly more risky than leaving an object embedded under the skin. Similarly, there is no apparent reason to doubt the general usefulness of ballistics information, whether or not the bullet involved was ever lodged in a human body.

As to the second element, there is apparently no doubt that a foreign object is lodged in petitioner's shoulder, and there is substantial evidence that the object is probably a bullet. The only real question is whether the bullet will amount to evidence. Given the possibility that the bullet will be unidentifiable, it is not certain that evidence will be found. But the Court is satisfied that there is a "clear indication" that evidence will be found, beyond a "mere chance," Schmerber, 384 U.S. at 770. As the Circuit Court noted (Tr. 22), petitioner apparently does not seriously challenge either this factor or the fourth, that the procedure would be performed in a hospital.

The element petitioner challenges most strongly, and the one of greatest concern to the Court, is the third: whether the procedure involves "virtually no risk, trauma, or pain," Schmerber, 384 U.S. at 771. The Circuit Court also explicitly found this element satisfied (Tr. 22, 22), and this Court concludes likewise. As noted supra, the doctor did testify that the risk was greater than the risk involved in leaving the bullet, though he also qualified his assessment of the latter risk by saying "if [the bullet] doesn't produce any pain or other problem." But he estimated the risk of the procedure as perhaps one in 10,000 or one in 100,000. "Virtually no risk" does not mean "absolutely no risk." While the Court declines to attempt to establish any specific guidelines as to what quantity of risk constitutes "virtually" none, it does find that the uncontroverted evidence in the instant case establishes that the proposed procedure can be carried out with virtually no risk to the petitioner.

The Court concludes that the precise facts before it do not establish an unreasonable intrusion into petitioner's privacy under the terms of Schmerber. Accordingly, the Court concludes that petitioner is not likely to prevail on the merits of his claim that his fourth amendment rights would be violated by the proposed surgery. This conclusion applies to both the habeas corpus claim and the § 1983 claim.[4]

VI. Setting of Bond

At the hearing of August 5, 1982, the Commonwealth's Attorney moved to increase petitioner's bond from $2,000 to $10,000. The Circuit Court raised the bond to $10,000 and declined to reverse itself at the hearing of August

15, 1982. Petitioner asserts that in raising the bond, the Circuit Court considered only the possibility that petitioner would destroy the evidence, which petitioner says is not a permissible basis for setting bond under Va. Code § 19.2-121.

The Petition and accompanying Memorandum do not make clear whether petitioner makes this claim as a means for establishing his custody for purposes of his habeas corpus claim or as a separate deprivation of constitutional rights. If his purpose is the former, the Court need not consider the contention, as the Court has accepted for purposes of the habeas corpus claim petitioner's assertion that he would be in the custody of the Sheriff or his agents at the time of the surgery.

If petitioner's purpose is the latter, his claim is unsupported by the record. At the August 15 hearing, the Circuit Court clearly indicated that it was taking into account the factors related to insuring the presence of the accused, as Va. Code § 19.2-121 directs. The Circuit Court also gave petitioner full opportunity to put on evidence as to such factors. (Tr. 104-06, 113-21). Whether or not the Circuit Court erred in raising the bond on August 5, it has now given full consideration to the appropriate factors for setting bond. Petitioner has not demonstrated that his current confinement violates the Constitution.

VII. Conclusion

The Court concludes that petitioner has not justified the imposition of a preliminary injunction in light of the four factors enumerated in Talbert, Inc. v. Bradshaw, supra. In the instant case, the critical factor is the likelihood of prevailing on the merits. The Court is satisfied that the likelihood that petitioner will so prevail is too slight to cause the interaction of the four factors to be resolved in his favor.

An appropriate order will enter.

UNITED STATES DISTRICT JUDGE

Date OCT 15 1982

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[1] Much of what appears in the transcript may be based on hearsay testimony; however, the operative facts bearing on the question before this Court do not appear to be based on hearsay. Accordingly, the Court has no occasion to consider the possibly hearsay nature of certain background facts as set forth in this footnote.

In the early morning hours of July 19, 1981, Ralph E. Watkinson was locking the door of his business, the Lombardy Market, when he observed a man ("the assailant") approaching him with a gun in his hand. As the assailant approached Watkinson, the latter drew his own pistol. When the assailant pulled at Watkinson to "freeze," Watkinson fired two shots. The assailant returned the fire, striking Watkinson once in each leg. Thereafter, the assailant fled into a nearby alley. Watkinson was transported by ambulance to the Medical College of Virginia.

Shortly after the police arrived at the scene of the shooting, another police car responded to the area and the police officers in this latter car found the petitioner, Rudolph Lee, Jr., approximately eight blocks from the scene of the shooting with a gunshot wound in the left chest area. Petitioner was also transported by ambulance to the Medical College of Virginia.

[3] Indictments in these matters were returned by a grand jury of the Circuit Court of the City of Richmond, Division I, on September 1, 1981 (Case No. F-81-1617 to 1621).

[4] Petitioner finds the Crowder application faulty because the Crowder court looked for only probable cause for the search, whereas Schneckloth required "a clear indication that in fact such evidence exists," 384 U.S. at 970; the Crowder court failed to consider the need for the evidence, as Schneckloth did, id. at 970-71; and to determine whether the operation was minor, the Crowder court looked at the risk of permanent injury, whereas the Schneckloth court looked to see that there was "virtually no risk, trauma, or pain," id. at 971.

[5] Accordingly, the Court need not consider respondents' contention that Allen v. McCurry, 449 U.S. 90 (1980), bars this Court's consideration of the merits of petitioner's § 1983 claim.

FILED

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CLERK, U. S. DIST. COURT
RICHMOND, VA.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RUDOLPH LEE, JR., Petitioner,	
v.	Civil Action No. 82-0872-R
ASHTON J. HINDSON, SHERIFF, et al., Respondents.	

MEMORANDUM

By order of October 15, 1982, the Court dismissed petitioner's[1] petition for a writ of habeas corpus and denied his application for an injunction that would have prohibited the respondents from causing the surgical removal of an object, believed to be a bullet, from petitioner's chest. The factual background of this matter is set out in the Court's memorandum of October 15.

On October 21, 1982, the petitioner received a hearing in the Circuit Court of the City of Richmond, Virginia, Division I ("state court") on his claim that circumstances had changed such that the state court should rescind its order allowing the surgical procedure. The state court denied petitioner's motion to revoke or rescind the order.

Petitioner immediately sought review in the Supreme Court of Virginia and, on the same day, filed a "Motion for a New Trial" in this Court. The matter in this Court came on for hearing before the Honorable D. Dortch Warriner on October 21 and 22, 1982. Upon the advice of counsel that a transcript of the state court proceedings was not then available, and upon the assurances of counsel for respondents that the surgical procedure would not be implemented pending the production of such transcript, the Court declined to issue the requested restraining order, concluding that the agreement of the parties obviated the need therefor.

During the time in which the transcript was being prepared, the petitioner filed a motion to redesignate his "Motion

for a New Trial" a "Motion to Reopen the Petition and to Alter or Amend the Judgment." The Court subsequently ordered the petition reinstated on the docket. As stated in the Court's memorandum of October 15, the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1343(3), 2241(c)(3).

After the parties submitted a copy of the state court transcript, the matter again came on for hearing in this Court on November 1. By that time, the Supreme Court of Virginia had denied petitioner's motion for reconsideration. At the November 1 hearing, this Court found that the state court transcript from the October 21 hearing was devoid of factual findings.[2] The Court then entered a temporary restraining order against the surgical procedure in order to afford the parties an opportunity to submit such additional evidence as either side deemed appropriate. On November 10, evidence, encompassing medical records, x-ray prints, and testimony of a surgeon, was taken. At that hearing, all parties agreed that the matter was submitted on the merits for purposes of considering the application for a permanent injunction. This memorandum embodies the Court's findings of fact and conclusions of law supplemental to or, where appropriate, in lieu of those set forth in the October 15 memorandum.

I. Motion to Dismiss Parties

Respondents the Attorney General of Virginia, Gerald L. Baliles, and the Circuit Court of the City of Richmond, Virginia, Division I, have moved the Court for an order dismissing them as parties to this action. In support of their motion, these respondents state, "This Court has ruled that the above-styled case is being considered solely as a petition for a writ of habeas corpus"; therefore, inasmuch as these respondents are not "custodians" of petitioner against whom the writ will issue, they contend they are not proper respondents to a petition for a writ of habeas corpus. The fundamental deficiency in respondents' argument in this regard is the fact that petitioner's alleged cause of action under 42 U.S.C. § 1983 remains pending before this Court, and respondents are proper

parties defendant to that claim. Judge Merhige, in noting the petitioner might be barred by res judicata in his § 1983 action from relitigating certain issues, did not dismiss the § 1983 claim; rather, Judge Merhige indicated he was viewing the matter which came on for hearing before him as a petition for a writ of habeas corpus. Judge Merhige stated he was pursuing this approach because the equitable powers of the Court upon a writ of habeas corpus were sufficiently broad to afford petitioner the immediate relief requested, if justified. There was, consequently, no cause to consider the possible res judicata effects of the state court findings at the time the issue was raised.[3] Accordingly, respondents' motion will be denied.

II. Abstention

Respondents urge this Court to abstain "from intervening in a pending state criminal prosecution." In support of this proposition, respondents rely on the decision of the United States Supreme Court in Younger v. Harris, 401 U.S. 37 (1971), and contend the instant matter does not fall within an exception to the Younger doctrine.

As an initial matter, the Court notes the anti-injunction statute, 28 U.S.C. § 2283, expressly provides, in part, "[a] court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress." In Younger, the Supreme Court reserved the question whether actions brought under 42 U.S.C. § 1983 fall within the "expressly authorized" exception to the anti-injunction statute. 401 U.S. at 54. In the subsequent term of the Court, however, the Court squarely addressed the issue and concluded § 1983 presents an express exception to the prescription of § 2283. See Mitchum v. Foster, 407 U.S. 225, 242-43 (1972). Accordingly, the anti-injunction statute does not operate in this § 1983 action to bar this Court from enjoining the respondents' alleged prospective violation of petitioner's constitutional rights in the state court criminal proceeding. Similarly, it has long been established that a federal court may stay a state court criminal proceeding for any matter involved in

a federal habeas corpus proceeding. See, e.g., Ex parte Royall, 117 U.S. 241, 248-49 (1886); 28 U.S.C. § 2251; therefore, § 2283 provides no impediment to this Court's authority to grant the relief requested even insofar as this matter proceeds as a petition for a writ of habeas corpus under 28 U.S.C. § 2241.

The anti-injunction statute being inapplicable to bar consideration of the instant matter, the question becomes whether the principles articulated in Younger counsel against this Court's passing on the issues raised.[4] Younger dealt with the decision of a three-judge court to restrain a state prosecution under what the three-judge court found to be an impermissibly vague and overbroad state statute. In the cause sub judice, petitioner has not requested that this Court restrain his prosecution in the state court. Nor would the relief sought, if granted, prevent the state from going forward with that criminal proceeding. The precise question addressed in Younger is, therefore, not presented on the facts of this case. To the extent Younger may be read as speaking to the broader issue of federal court intervention of any kind in pending state court criminal proceedings, however, and the Younger opinion may fairly be so read,[5] the Court has examined the Younger rationale in determining whether abstention is required in this case.

Younger represents a reaffirmation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances. 401 U.S. at 43. The "special circumstances" alluded to must take the form of threatened great and immediate irreparable injury. Id. at 46. The Court pointed out, however, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution cannot, by themselves, form the basis for this type of great and immediate irreparable injury. "Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." Id.

Having reviewed the limited factual record before the Court, it is apparent the special circumstances which render

Younger abstention inappropriate are present in the case at bar. As the threatened harm involves involuntary surgery on petitioner's person, it may easily be seen the prospective harm is "great." Similarly, the Commonwealth having unequivocally indicated its intention to proceed with such surgery, the immediacy of the threatened injury is apparent. The state court considered the matter and entered an order empowering the Commonwealth to remove the bullet from plaintiff involuntarily. At the November 1 hearing in this Court, the Commonwealth felt it could not agree to refrain from implementing the surgical procedure in the period before this Court's evidentiary hearing, thus necessitating the Court's temporary restraining order. It is thus beyond dispute the threatened harm is impending and immediate.

Equally clear is that the threat to petitioner's fourth amendment right to be secure in his person from an unreasonable search and seizure can in no way be eliminated by his defense of the charges in the state court action. Indeed, it is apparent the threatened harm will ripen into actual injury should this Court fail to intervene. The factual distinctions between the Younger case and the instant matter perhaps best illustrate why petitioner's defense of the criminal charges will be unavailing to eliminate the threatened harm.

In Younger, after state criminal proceedings had been commenced against them, the appellees had been granted declaratory and injunctive relief by a three-judge federal court which declared a state statute facially void for vagueness and overbreadth and restrained the State of California from prosecuting the appellees thereunder. The Supreme Court reversed, finding the threatened injury to appellee Harris to be only "that incidental to every criminal proceeding brought lawfully and in good faith," and the same to be insufficient to justify federal intrusion into a pending state court criminal proceeding. 401 U.S. at 49 (quoting Douglas v. City of Jeannette, 319 U.S. 157, 164 (1943)). Underlying the Court's conclusion in this regard was the availability of the state forum for the raising of

Harris's constitutional claims. Notions of comity, that is, a proper respect for state functions, were said by the Court to have been if the states and their institutions were left free to perform their separate functions in their separate ways. 401 U.S. at 44. In Younger, appellee Harris was free to raise the facial invalidity of the statute in question as a defense to the state criminal charges. If unsuccessful in the trial court, Harris could raise the issue on direct appeal in the state system and possibly in the United States Supreme Court. If denied relief on direct appeal, Harris had the option of asserting his constitutional claims in a collateral attack on his conviction. Thus, the threatened harm, namely, conviction under an essentially unconstitutional statute, could be eliminated by Harris's defense of the criminal charges in the state courts, and thus the special circumstances warranting or justifying federal intervention were not present.

In contrast to the Younger case, the instant petitioner's defense of the state criminal charges cannot eliminate the threat of the asserted violation of his fourth amendment rights. As the Commonwealth has indicated its intention to proceed with the surgery, and the courts of Virginia have placed their imprimatur on the procedure, this Court's failure to act will undeniably result in the involuntary removal of the bullet from petitioner's body. Accordingly, the prospective constitutional abridgment complained of here will take place and be complete and irreversible prior to the criminal trial. Moreover, unlike the situation in Younger, petitioner here will have no opportunity to vindicate the claimed abridgment by way of his defense of the criminal charges at trial. Petitioner is not here attempting to suppress evidence illegally obtained; rather, he seeks an injunction preventing an allegedly impermissible physical intrusion by the Commonwealth into his body. Were the bullet removed from his body but later suppressed as evidence by the trial court,[8] it nevertheless could not be said that the harm to petitioner had been eliminated by his defense to a single criminal prosecution, as required by Younger. For the threatened harm

will have ripened into actuality at the moment petitioner is involuntarily subjected to the surgical procedure.

In summary then, because the threatened harm to petitioner is irreparable, great, and immediate, and cannot be eliminated by his defense against the criminal charges in the state court, the Court concludes abstention under the Younger doctrine is neither required nor appropriate.

III. Dismissal of Claim

Insofar as this matter proceeds as a petition for a writ of habeas corpus, defendants contend this Court lacks subject matter jurisdiction because plaintiff is not currently "in custody" as that term is used in 28 U.S.C. § 2241. Although the Court acknowledges the instant motion presents a somewhat novel view of the custody requirement, the Court concludes the broad interpretation given that term by the United States Supreme Court warrants the conclusion that this petitioner is "in custody." See Hensley v. Municipal Court, San Jose-Milpitas Judicial District, 411 U.S. 345 (1973). In Hensley, the Court concluded a petitioner who was free on his own recognizance pending execution of sentence was nonetheless "in custody" within the meaning of 28 U.S.C. § 2254(a),[9] Of particular importance to the case at bar, the Court stated:

> Plainly, we would badly serve the purposes and the history of the writ to hold that under these circumstances the petitioner's failure to spend even 10 minutes in jail is enough to deprive the district court of power to hear his constitutional claim.

411 U.S. at 350-51. Similarly, it would be absurd for this Court to require petitioner to be strapped momentarily to the surgeon's table before considering his petition. To the extent the "custody" in question may be viewed as future custody, the matter is addressed by Rule 2(b) of the Rules Governing § 2254 Cases and the notes accompanying it. Specifically, the Advisory Committee stated in part in a note accompanying Rule 2:

> (5) The applicant is in custody, although not physically restrained, and is attacking a state action which will result in his future custody rather than the government action out of which his present custody arises.

It cannot be disputed that the custody complained of here will be

carried out under the auspices of the Commonwealth. In other words, it is clearly the action of the state which will subject petitioner to custody in the operating room. Accordingly, whether the restraint on petitioner is viewed as present custody under Hensley or future custody of the type referred to in Rule 2(b), the Court concludes petitioner is "in custody" for purposes of 28 U.S.C. § 2241. Further, petitioner having exhausted all state remedies available to him, the Court concludes it has subject matter jurisdiction over the instant petition.

While the Court is satisfied that its conclusion as to the custody question is correct, the Court recognizes that the question is a close one.[5] However, the Court is also satisfied that the instant action can proceed in precisely the same manner as the form as a civil rights action pursuant to 42 U.S.C. § 1983. The only impediment respondents have suggested to treating this matter as a § 1983 action is the principle of collateral estoppel set forth in Allen v. McCurry, 449 U.S. 90 (1980).

Even supposing the state court made adequate findings and conclusions for purposes of collateral estoppel, Allen v. McCurry does not indicate that this Court should give collateral estoppel effect to the state court determinations here. "[O]ne general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." Id. at 95. The Court has already determined that petitioner did not receive a full and fair opportunity to litigate this matter in the state court, see note 3 supra; accordingly, no collateral estoppel effect attaches to such determinations as the state court made.

Thus, the Court concludes that respondents have not raised grounds justifying dismissal of this matter either as a habeas corpus action or as a § 1983 claim.

IV. Change of Circumstance

The evidence before the Court[6] indicates petitioner's physical condition probably has not changed since October 15, 1981. I.e., the bullet apparently has not moved. The changed circumstance petitioner relies on is that more is now known about his physical condition than before. I.e., the bullet is now known to be in a different location from that previously supposed. In preparation for surgery, the hospital staff took area 12 or 13 x-rays of petitioner's chest. The uncontroverted evidence is that those x-rays indicate the bullet is lodged at least 2.5 to 3 centimeters below the surface of the skin. The previous estimate that the bullet was located about 0.5 centimeters below the skin was based only on clinical examination in the form of palpating, or manually manipulating, a hard mass assumed to be the bullet; the surgeon who testified at the state court hearing on October 15 indicated by non verbal means that hard mass to be most tissue.

The uncontroverted evidence shows, and the Court finds, that the bullet is apparently lodged in muscle tissue; reaching it would require an incision of approximately 3 centimeters; the surgeon designated to perform the procedure would require that petitioner be placed under general anesthesia for the operation; an anesthesiologist would administer a endotoxin to relax the patient, then sodium pentothal, a barbiturate, to put the patient to sleep, then a gaseous mixture of oxygen and nitrous oxide; and the risks involved in the procedure are greater than those associated with the procedure previously contemplated.

The Court concludes that this set of circumstances is materially different from the former one where: (1) the bullet was thought to be lodged just beneath the skin; (2) reaching it would have required an incision of approximately 1.5 centimeters; and (3) the procedure would have been performed under local anesthesia. The sources of increased risk attending the procedure currently contemplated are many: penetrating the muscle layer and separating the muscle fibers increases the danger of damaging nerves, blood vessels, and other tissues such as that surrounding the pleural cavity; the longer and deeper incision carries with it an increased danger of infection; administering general anesthesia requires preliminary testing that carries

risks of the contemplated general anesthesia [illegible] carries enough risks, such as of depressed respiration, that the anesthesiologist attends the surgery and constantly monitors vital signs, whereas local anesthetic can be administered entirely by the surgeon. The Court must examine the legal significance of the circumstances now before it.

B. Fourth Amendment Claim

In the October 15 memorandum, the Court applied a test the petitioner had derived from Schmerber v. California, 384 U.S. 757 (1966), to decide whether, even under the interpretation most generous to the petitioner, the proposed intrusion was unreasonable in terms of the Fourth Amendment. This Court's reading of Schmerber, however, is that the four factors petitioner identified in the opinion were not set forth as a test. Rather, the Schmerber Court was merely identifying elements of the situation before it that supported the conclusion that the intrusion in that case was constitutionally permissible.

Fourth amendment questions are peculiarly fact-specific, as it is not surprising to find that a court's decision rests on the particular facts before it. Yet the lower courts must carefully examine the Supreme Court's decisions and derive all available guidance from them. Sometimes the lower courts derive tests and doctrines from the Supreme Court's observations as to the facts of a specific case. No date, however, apparently no federal court has extrapolated such a test from Schmerber. Indeed, the only federal case applying Schmerber to a surgical procedure, United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (en banc), cert. denied, 429 U.S. 1062 (1977), mentioned some of petitioner's asserted four factors, though it did examine some elements related to them, and this Court declines to enunciate a "Schmerber doctrine" based on the Supreme Court's analysis of particular facts.

The Court will, however, apply the explicit holding of Schmerber:

> That we hold today that the Constitution does not forbid the State minor intrusions into an individual's body under strictly limited circumstances is no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

384 U.S. at 772. And while the Court does not find a litmus test in the Supreme Court's observations as to the facts before it, the Court does find some guidance as to the kinds of factors considered relevant to a determination of whether an intrusion is "minor" and performed "under stringently limited circumstances."

In the October 15 memorandum, this Court characterized the set of facts then before it as representing "essentially the limit in the degree and kind of intrusion constitutionally permissible." The current set of facts exceeds that limit. Without repeating in detail the nature of the proposed procedure and the associated risks,[10] the Court simply observes that the totality of the factors involved constitutes a physical intrusion that is significantly greater than that previously contemplated, and the risks previously involved have increased in magnitude even as new risks are being added. While the evidence did not adequately quantify at least some of those risks, the Court is satisfied that, taken together, they far exceed the level of "virtually no risk." Id. at 771. The Court concludes that an incision 5 cm long and 2.5 cm deep under general anesthesia to permit probing into and past muscle tissue simply cannot be characterized as a minor intrusion. Whether or not a surgeon would characterize the procedure as "minor surgery" is of no moment; there is no reason to suppose that the definition of a medical term of art should coincide with the parameters of a constitutional standard.

Schmerber essentially addresses only the extent and nature of physical intrusion, since that was basically all that was involved in the blood test there. However, the reasonableness of an intrusion turns also on the degree and manner of its interference with a person's privacy and dignity. In Rochin v. California, 342 U.S. 165 (1952), the Court made no reference to physical pain or risk in evaluating the constitutionality of the intrusion involved in pumping the petitioner's stomach to obtain

the evidence lodged there. The Court simply held, "This is conduct that shocks the conscience." Id. at 172.

The Court does not here identify any single element of the proposed procedure as the linchpin to the Court's determination of the reasonableness of the intrusion, but the fact that general anesthetic is involved is very important to the Court's conclusion that the procedures shock the conscience. The Court is appalled at the prospect of government authorities rendering a person unconscious, cutting him open, and probing around inside his body for evidence which might, or indeed might not, aid them in convicting him of a crime. It cannot be said that such a procedure involves "virtually no . . . trauma." Schmerber, 384 U.S. at 771.

The procedure contemplated here goes far beyond the prick of a needle in Schmerber, the slight intrusion in Crowder, and the minor procedure originally supposed to be required in this matter. The Commonwealth proposes to forcibly subdue petitioner by injection, make a substantial incision into his body, retract muscle tissue in an attempt to locate the subject bullet, and if successful in locating it, extract it from his body. All of this is to be done where the procedure is concededly not medically necessary for the preservation of petitioner's life and health. Considering the scope of the intrusion, the risks involved, and the affront to petitioner's dignity, the Court concludes the procedure contemplated is more akin to the impermissible activity in Rochin than to the minor intrusion in Schmerber. In short, "these are methods too close to the rack and the screw to permit of constitutional differentiation." Rochin v. California, 342 U.S. at 172.

Considering together the type and extent of physical intrusion and the type and extent of intrusion on petitioner's privacy and dignity, the Court is satisfied that the proposed surgical procedure constitutes an unreasonable search within the meaning of the fourth amendment.

VI. Conclusion

The Court concludes that this action and all parties

to it are properly before the Court. The Court further concludes that the proposed surgical procedure would constitute an unreasonable search in violation of petitioner's fourth amendment rights. Accordingly, the Court will permanently enjoin the procedure. While the parties have not raised the question, the Court concludes that the petition does not state a claim against respondents Gerald L. Baliles and the Circuit Court of the City of Richmond, Virginia, Division I; accordingly, they will be dismissed.

An appropriate order will issue.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date NOV 12 1982

FOOTNOTES

1 To the extent that this action arises under 42 U.S.C. § 1983, as well as being a petition for a writ of habeas corpus, petitioner might better be styled 'plaintiff.' However, in the interests of simplicity and consistency, the Court will refer to him as 'petitioner,' even in regard to matters relevant only to his § 1983 claim.

2 In a habeas corpus proceeding under 28 U.S.C. § 2254(d), factual determinations by a state court are 'presumed to be correct,' and this Court could not disregard such determinations without explaining its basis for overcoming the presumption of correctness. Sumner v. Mata, 449 U.S. 539 (1981). However, the Court has found that the state court made no such factual determinations. The only finding of the court that appears in the record is stated as follows: 'that there is no material change in circumstances that would require this Court to change Judge Lumpkin's previous order' (Tr. 86); 'that there are no particular changes in circumstances' (Tr. 87); 'that there have been no material changes to warrant revoking or rescinding this Court's Order of August 25, 1982.' These conclusions were additionally memorialized in the state court's order of October 21, 1982 (Respondents Ex.1). The Court has found that these statements constitute a conclusion of law rather than a finding of fact.

Even if that conclusion is taken to be a factual determination for purposes of § 2254(d), the Court concludes that 'such factual determination is not fairly supported by the record,' 28 U.S.C. § 2254(d)(8), so that the presumption of correctness is overcome. As appears from the Court's discussion infra, the Court concludes that the circumstances now before the Court justify imposition of the injunction requested, whereas the Court concluded on the circumstances previously presented, i.e., the circumstances on which Judge Lumpkin based the August 25 order to perform the surgical procedure, that the injunction should not issue. A fortiori, the Court considers the difference in circumstances material.

Under § 2254(d)(2), the presumption of correctness is overcome also if 'the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing.' Upon examination of the state court transcript and the affidavit of petitioner's counsel, filed October 21, 1982, the Court concludes that the procedures followed in the state court were conducted with such haste that the petitioner did not have a full and fair opportunity to litigate his claim there. At the October 21 hearing, petitioner's counsel protested that he had had only two days in which to prepare for the hearing, and in that short time he had been unable to interview all the witnesses, review all the medical records, research the medical and legal issues involved, and obtain the services of an expert anesthesiologist who could help prepare cross-examination of the hospital's anesthesiologist and could testify on petitioner's behalf. When the court took a midday recess, the court asked petitioner's counsel if he had any further evidence to put on. Petitioner's counsel represented that he would like to call an independent anesthesiologist who had had a chance to review the records and perform a 'consult,' but he could not have one available at two o'clock, when the court intended to continue. (Tr. 68-69). The court responded: 'Well, we will hear him at two o'clock if you have him; otherwise we'll hear your argument.' (Tr. 70). After the recess, petitioner's counsel made a proffer concerning an anesthesiologist he had contacted, but who was in surgery at two o'clock; he also noted his unsuccessful efforts to reach another anesthesiologist. (Tr. 70-71).

The record does not indicate any exigent circumstances leading the state court to curtail its inquiry; the Court must assume that the normal press of judicial business urged the state court to move the matter along expeditiously. While the Court appreciates and shares the concern that judicial proceedings must not

be needlessly prolonged, the Court concludes that in this instance petitioner did not have a fair opportunity to prepare for the October 21 hearing. The Court has been impressed with the diligence, not to mention the legal skill, exhibited by petitioner's counsel, and the Court is satisfied that he did all that he could do or that a court could expect him to do during the two days he had in which to prepare for the October 21 hearing. He simply did not have adequate time to do his own preparation work, and it is not surprising that on such short notice he could not locate an expert anesthesiologist for whom the hearing date was available. Thus, 'the factfinding procedure . . . was not adequate to afford a full and fair hearing' for purposes of 28 U.S.C. § 2254(d).

This conclusion also underscores respondents' contention that Stone v. Powell, 428 U.S. 465 (1976), prohibits the Court from reaching the merits of this matter. As the Court's October 21 memorandum explained, neither the holding nor the rationale of Stone v. Powell applies to the instant matter because this matter does not involve the exclusion or admission of evidence allegedly resulting from an unconstitutional search or seizure. But additionally, Stone v. Powell only precludes federal habeas corpus consideration of the merits 'where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim.' Id. at 494. Petitioner received no such opportunity in the state court.

3 It is apparent the Court could not have concluded the § 1983 action was barred by res judicata since the state court findings were not before the Court for consideration at the time of the hearing.

4 In Mitchum v. Foster, supra, the Court noted:

> [W]e do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in Younger v. Harris, 401 U.S. 37, and its companion cases. They are principles that have been emphasized by this Court many times in the past.

407 U.S. at 243 (citations omitted).

5 See Younger, 401 U.S. at 43, 46.

6 It would appear doubtful the state court would entertain a motion to suppress based on an impermissible search in view of the possible res judicata/collateral estoppel effects of its prior determinations.

7 The Court is aware of no distinction between the meaning of "in custody" under § 2254(a) on the one hand and § 2241 on the other.

8 Although the language of Rule 2(b) and the accompanying Advisory Committee note clearly contemplates petitions attacking future custody generally, it might be argued the Committee had in mind the context where a current prisoner who faces future additional confinement on a different conviction seeks to collaterally attack that conviction. If the Committee would limit the procedure to that context, then the Committee's remarks do not support the Court's conclusion that the instant petitioner satisfies the 'in custody' requirement. Of course, the Committee may have had that context in mind, if indeed it did, only because that context is the most common one in which the issue of attacking future custody arises, and not out of an intent to limit the procedure to that context.

Resort to the approach of the Supreme Court in Hensley pro-
vides a sounder basis for examining the custody question. It

cannot seriously be contended that a meaningful distinction exists between the custody in which petitioner now finds himself and the unique custody to which he will be subjected in the operating room. The surgical procedure will be conducted at the behest and under the authority of the Commonwealth, and will, therefore, be but part and parcel of the Commonwealth's current custody of petitioner. This being so, the Court comprehends no purpose to be served by constructing a metaphysical distinction between these "custodies" where, in reality, none exists.

9 The findings of fact embodied in this section are derived entirely from the transcript of the state court proceedings of October 21. The Court finds the additional evidence submitted by the parties to be either cumulative or, in the case of the x-ray prints, incomprehensible. Thus, the Court's conclusion that the facts are materially different from those previously presented is based entirely on the state court record; in determining that the state court conclusion that there were no materially different circumstances was "not fairly supported by the record," see note 8 supra, the Court is looking at the same body of evidence.

10 See Part IV, supra, at 9-10.

SUPPLEMENTAL APPENDIX

(2)

NO. 83 - 1334

Supreme Court, U.S.
FILED
MAR 8 1984
ALEXANDER L. STEVAS
CLERK

IN THE

UNITED STATES SUPREME COURT

OCTOBER 1983 TERM

ANDREW J. WINSTON
and
AUBREY M. DAVIS, JR.,

Petitioners,

v.

RUDOLPH LEE, JR.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES
DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RUDOLPH LEE, Petitioner,	)	
v.	)	Civil Action No. 82-0672-R
ANDREW J. WINSTON, et al., Respondents,	)	

ORDER

For the reasons stated in the accompanying memorandum and deeming it proper so to do, it is ADJUDGED and ORDERED as follows:

(1) The respondents Andrew J. Winston and Aubrey M. Davis, Jr., their agents, employees, and all persons acting in concert therewith be and they are permanently enjoined from, or permitting him to be delivered, to any medical fecility or elsewhere for the following purposes: (1) pre-surgical testing

leading to a surgical procedure to be performed for the purpose of removing from the petitioner's body an object believed to be a bullet located in his upper left chest area; or (2) actual implementation of such surgery.

(2) The petitioner herein be and he is hereby enjoined from destroying, mutilating, or disposing of the object now embedded in his upper left chest area, and believed to be a bullet. The injunction referred to in this paragraph shall remain in full force and effect for a period of thirty (30) days unless an appeal of this order is taken, in which event said injunction shall remain in full force and effect until all appellate proceedings have been concluded.

(3) The respondents Gerald L. Baliles and the Circuit Court of the City of Richmond, Virginia, Division I, be and they are dismissed.

(4) Judgement is entered in favor of petitioner against respondents.

(5) The writ of habeas corpus issues to the extent of precluding custody of the petitioner for purposes referred to in paragraph (1) of this order.

Let the Clerk send copies of the memorandum and order to all counsel of record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date 11-12-82

IN THE UNITED STATES
DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RUDOLPH LEE, JR., Petitioner,	)	
v.	)	Civil Action No. 82-0672-R
ANDREW J. WINSTON, SHERIFF, et al., Respondents.	)	

MEMORANDUM

By order of October 15, 1982, the Court dismissed petitioner's[1] petition for a writ of habeas corpus and denied his application for an injuction that would have prohibited the respondents from causing the surgical removal of an object, believed to be a bullet, from petitioner's chest. The factual background of this matter is set out in the Court's memorandum of October 15.

On October 21, 1982, the petitioner received a hearing in the Circuit Court of

the City of Richmond, Virginia, Division I ("state court") on his claim that circumstances had changed such that the state court should rescind its order allowing the surgical procedure. The state court denied petitioner's motion to revoke or rescind the order.

Petitioner immediately sought review in the Supreme Court of Virginia and, on the same day, filed a "Motion for a New Trial" in this Court. The matter in this Court came on for hearing before the Honorable D. Dortch Warriner on October 21 and 22, 1982. Upon the advice of counsel that a transcript of the state court proceedings was not then available, and upon the assurances of counsel for respondents that the surgical procedure would not be implemented pending the production of such transcript, the Court declined to issue the requested restaining

order, concluding that the agreement of the parties obviated the need therefor.

During the time in which the transcript was being prepared, the petitioner filed a motion to redesignate his "Motion for a New Trial" as a "Motion to Reopen the Petition and to Alter or Amend the Judgment." The Court subsequently ordered the petition reinstated on the docket. As stated in the Court's memorandum of October 15, the Court has jurisdiction over this matter pusuant to 28 U.S.C. §§ 1343(3), 2241(c)(3).

After the parties submitted a copy of the state court transcript, the matter again came on for hearing in this Court on November 1. By that time, the Supreme Court of Virginia had denied petitioner's motion for reconsideration. At the November 1 hearing, this Court found that the state court transcript from the October 21 hearing was devoid of factual

findings.[2] The Court then entered a temporary restraining order against the surgical procedure in order to afford the parties an opportunity to sumit such additional evidence as either side deemed appropriate. On November 10, evidence as encompassing medical records, x-ray prints, and testimony of a surgeon, was taken. At that hearing, all parties agreed that the matter was submitted on the merits for purposes of considering the application for a permanent injunction. This memorandum embodies the Court's findings of fact and conclusions of law supplemental to or, where appropiate, in lieu of those set forth in its October 15 memorandum.

I. Motion to Dismiss Parties

Respondents the Attorney General of Virginia, Gerald L. Baliles, and the Circuit Court of the City of Richmond, Virginia, Division I, have moved the Court

for an order dismissing them as parties to this action. In support of their motion, these respondents state, "This Court has ruled that the above-styled case is being considered solely as a petition for a writ of habeas corpus"; therefore, inasmuch as these respondents are not "custodians" of petitioner against whom the writ will issue, they contend they are not proper respondents to a petition for a writ of habeas corpus. The fundamental deficiency in respondents' argument in this regard is the fact that petitioner's alleged cause of action under 42 U.S.C. § 1983 remains pending before this Court, and respondents are proper parties defendant to that claim. Judge Warriner, in noting the petitioner might be barred by res judicata in his § 1983 action from relitigating certain issues, did not dismiss the § 1983 claim; rather,

Judge Warriner indicated he was reviewing the matter which came on for hearing before him as a petition for a writ of habeas corpus. Judge Warriner stated he was pursuing this approach because the equitable powers of the Court upon a writ of habeas corpus were sufficiently broad to afford petitioner the immediate relief requested, if justified. There was, consequently, no cause to consider the possible res judicata effects of the state court findings at the time the issue was raised.[3] Accordingly, respondents' motion will be denied.

II. Abstention

Respondents urge this Court to abstain "from intervening in a pending state criminal prosecution." In support of this suggestion, respondents rely on the decision of the United States Supreme Court in Younger v. Harris, 401 U.S. 37

(1971), and contend the instant matter does not fall within an exception to the Younger doctrine.

As an initial matter, the Court notes the anti-injunction statute, 28 U.S.C. § 2283, expressly provides, in part, "[a] court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress." In Younger, the Supreme Court reserved the question whether actions brought under 42 U.S.C. § 1983 fall within the "expressly authorized" exception to the anti-injunction statute. 401 U.S. at 54. In the subsequent Term of the Court, however, the Court squarely addressed the issue and concluded § 1983 presents an express exception to the proscription of § 2283. See Mitchum v. Foster, 407 U.S. 225, 242-43 (1972). Accordingly, the anti-injunction statute does not operate

in this § 1983 action to bar this Court from restraining the respondent's alleged prospective violation of petitioner's constitutional rights in the state court criminal proceeding. Similarly, it has long been established that a federal court may stay a state court criminal proceeding for any matter involved in a federal habeas corpus proceeding, see, e.g., Ex parte Royall, 117 U.S. 241, 248-49 (1886); 28 U.S.C. § 2251; therefore, § 2283 provides no impediment to this Court's authority to grant the relief requested even insofar as this matter proceeds as a petition for a writ of habeas corpus under 28 U.S.C. § 2241.

The anti-injunction statute being inapplicalbe to bar consideration of the instant matter, the question becomes whether the principles articulated in Younger Counsel against this Court's passing on the

issues raised.[4] Younger dealt with the decision of a three-judge court found to be an impermissibly vague and overboard state statute. In the cause sub judice, petitioner has not requested that this Court restain his prosecution in the state court. Nor would the relief sought, if granted, prevent the state from going forward with that criminal proceeding. The precise question addressed in Younger is, therefore, not presented on the facts of this case. To the extent Younger may be read as speaking to the broader issue of federal court intervention of any kind in pending state court criminal proceedings, however, and the Younger opinion may fairly be so read,[5] the Court has examined the Younger rationale in determining whether abstention is required in this case.

Younger represents a reaffirmation of the national policy forbidding federal

courts to stay or enjoin pending state court proceedings except under special circumstances. 401 U.S. at 41. The "special circumstances" alluded to must take the form of threatened great and immediate irreparable injury. Id. at 46. The Court pointed out, however, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution cannot, by themselves, form the basis for this type of great and immediate irreparable injury. "Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." Id.

Having reviewed the limited factual record before the Court, it is apparent the special circumstances which render Younger abstention inappropriate are present in the case at bar. As the

threatened harm involves involuntary surgery on petitioner's person, it may easily be seen the prospective harm is "great." Similarly, the Commonwealth having unswervingly indicated its intention to proceed with such surgery, the immediacy of the threatened injury is apparent. The state court considered the matter and entered an order empowering the Commonwealth to remove the bullet from plaintiff involuntarily. At the November 1 hearing in this Court, the Commonwealth felt it could not agree to refrain from implementing the surgical procedure in the period before this Court's evidentiary hearing, thus necessitating the Court's temporary restraining order. It is thus beyond dispute the threatened harm is impending and immediate.

Equally clear is that the threat to petitioner's fourth amendment right to be

secure in his person from an unreasonable search and seizure can in no way be eliminated by his defense of the charges in the state court action. Indeed, it is apparent the threatened harm will ripen into actual injury should this Court fail to intervene. The factual distinctions between the Younger case and the instant matter perhaps best illustrate why petitioner's defense of the criminal charges will be unavailing to eliminate the threatened harm.

In Younger, after state criminal proceedings had been commenced against them, the appellees had been granted declaratory and injunctive relief by a three-judge federal court which declared a state statute facially viod for vagueness and overbreadth and restrained the State of California from prosecuting the appellees thereunder. The Supreme Court reversed,

finding the threatened injury to appellee Harris to be only "'that incidental to every criminal proceeding brought lawfully and in good faith,'" and the same to be insufficient to justify federal intrusion into a pending state court criminal proceeding. 401 U.S. at 49 (quoting Douglas v. City of Jeannette, 319 U.S. 157, 164 (1943)]. Underlying the Court's conclusion in this regard was the availability of the state forum for the raising of Harris's constitutional claims. Notions of comity, that is, a proper respect for state functions, were said by the Court to fare best if the states and their institutions were left free to perform their separate functions in their separate ways. 401 U.S. at 44. In Younger, appellee Harris was free to raise the facial invalidity of the statute in question as a defense to the state criminal charges. If

unsucessful in the trial court, Harris could raise the issue on direct appeal in the state system and possibly in the United States Supreme Court. If denied relief on direct appeal, Harris had the option of asserting his constitutional claims in a collateral attack on his conviction. Thus, the threatened harm, namely, conviction under an assertedly unconstitutional statute, could be eliminated by Harris's defense of the criminal charges in the state courts, and thus the special circumstances warranting or justifying federal intervention were not present.

In contrast to the Younger case, the instant petitioner's defense of the state criminal charges cannot eliminate the threat of the asserted violation of his fourth amendment procced with the surgery, and the courts of Virginia have placed their imprimatur on the procedure, this

Court's failure to act will undeniably result in the involuntary removal of the bullet from petitioner's body. Accordingly, the prospective constitutional abridgment complained of here will take place and be complete and irreversible prior to the criminal trial. Moreover, unlike the situation in Younger, petitioner here will have no opportunity to vindicate the claimed abridgment by way of his defense of the criminal charges at trial. Petitioner is not here attempting to suppress evidence illegally obtained; rather, he seeks an injunction preventing an allegedly impermissible physical intrusion by the Commonwealth into his body. Were the bullet removed from his body but later suppressed as evidence by the trial court,[6] it nevertheless could not be said that the harm to petitioner had been eliminated by his defense to a single criminal prosecution,

as required by Younger, for the threatened harm will have ripened into actuality at the moment petitioner is involuntarily subjected to the surgical procedure.

In summary then, because the threatened harm to petitioner is irreparable, great, and immediate, and cannot be eliminated by his defense against the criminal charges in the state court, the Court concludes abstention under the Younger doctrine is neither required nor appropiate.

III. Dismissal of Claims

Insofar as this matter proceeds as a petition for a writ of habeas corpus, defendants contend this Court lacks subject matter jurisdiction because plaintiff is not currently "in custody" as that term is used in 28 U.S.C. § 2241. Although the Court acknowledges the instant matter presents a somewhat novel view of the custody requirement, the Court concludes the broad interpretation given that term by the United

States Supreme Court warrants the conclusion that this petitioner is "in custody." See Hensley v. Municipal Court, San Jose-Milpitas Judicial District, 411 U.S. 345 (1973). In Hensley, the Court concluded a petitioner who was free on his own recognizance pending execution of sentence was nonetheless "in custody" within the meaning of 28 U.S.C. § 2254(a).[7] Of particular importance to the case at bar, the Court stated:

> Plainly, we would badly serve the purposes and the history of the writ to hold that under these circumstances the petitioner's failure to spend even 10 minutes in jail is enough to deprive the District Court of power to hear his constitutional claim.

441 U.S. at 352-53. Similarly, it would be absurd for this Court to require petitioner to be strapped momentarily to the surgeon's table before considering his petition. To the extent the "custody" in question may be viewed as future custody, the matter is

addressed by Rule 2(b) of the Rules Governing § 2254 Cases and notes accompanying it. Specifically, the Advisory Committee stated in part in a note accompanying Rule 2:

> (5) The applicant is in custody, although not physically restrained, and is attacking a state action which will result in his future custody rather than the government action out of which his present custody arises.

It cannot be disputed that the custody complained of here will be carried out under the auspices of the Commonwealth. In other words, it is clearly the action of the state which will subject petitioner to custody in the operating room. Accordingly, whether the restraint on petitioner is viewed as present custody under Hensley or future custody of the type referred to in Rule 2(b), the Court concludes petitioner is "in custody" for purposes of 28 U.S.C. § 2241. Further, petitioner having exhausted all state remedies available to him, the

Court concludes it has subject matter jurisdiction over the instant petition.

While the Court is satisfied that its conclusion as to the custody question is correct, the Court recognizes that the question is a close one.[8] However, the Court is also satisfied in its form as a civil rights action pursuant to 42 U.S.C. § 1983. The only impediment respondents have suggested to treating this matter as a § 1983 action is the principle of collateral estoppel set forth in Allen v. McCurry, 449 U.S. 90 (1980).

Even supposing the state court made adequate findings and conclusions for purposes of collateral estoppel, Allen v. McCurry does not indicate that this Court should give collateral estoppel effect to the state court determinations here. "[O]ne general limitation the Court has repeatedly recognized is that the concept

of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." Id. at 95. The Court has already determined that petitioner did not receive a full and fair opportunity to litigate this matter in the state court, see note 2 supra; accordingly, no collateral estoppel effect attaches to such determinations as the state court made.

Thus, the Court concludes that respondents have not raised grounds justifying dismissal of this matter either as a habeas corpus action or as a § 1983 claim.

IV. Change of Circumstance[9]

The evidence before the Court indicates petitioner's physical condition probably has not changed since October 15, 1982, i.e., the bullet apparently has not moved. The changed circumstance petitioner relies

on is that more is now known about his physical condition than before, i.e., the bullet is now known to be in a different location from that previously supposed. In preparation for surgery, the hospital staff took some 10 or 12 x-rays of petitioner's chest. The uncontroverted evidence is that those x-rays indicate the bullet is lodged at least 2.5 to 3 centimeters below the surface of the skin. The previous estimate that the bullet was located about 0.5 centimeters below the skin was based only on clinical examination in the form of palpating, or manually manipulating, a hard mass assumed to be the bullet; the surgeon who testified at the state court hearing on October 21 indicated he now believes that hard mass to be scar tissue.

The uncontroverted evidence shows, and the Court finds, that the bullet is apparently lodged in muscle tissue; excising it would require an incision of approximately

5 centimeters; the surgeon designated to perform the procedure would require that petitioner be placed under general anesthesia for the operation; an anesthesiologist would administer a sedative to relax the patient, then sodium pentothal, a barbiturate, to put the patient to sleep, then a gaseous mixture of oxygen and nitrous oxide; and the risks involved in the procedure are greater than those associated with the procedure previously contemplated.

The Court concludes that this set of circumstances is materially different from the former one where: (1) the bullet was thought to be lodged just beneath the skin; (2) excising it would have required an incision of approximately 1.5 centimeters; and (3) the procedure would have been performed under local anesthesia. The sources of increased risk attending the procedure currently contemplated are many:

penetrating the muscle layer and seperating the muscle fibers increases the danger of damaging nerves, blood vessels, and other tissues such as that surrounding the pleural cavity; the longer and deeper incision carries with it an increased danger of infection; administering general anesthesia requires preliminary testing that carries risks of its own, and general anesthesia itself carries enough risks, such as of depressed respiration, that the anesthesiologist attends the surgery and constantly monitors vital signs, whereas local anesthetic can be administered entirely by the surgeon. The Court must examine the legal significance of the circumstances now before it.

V. Fourth Amendment Claim

In the October 15 memorandum, the Court applied a test the petitioner had derived from Schmerber v. California, 384 U.S. 757 (1966), to decide whether, even

under the interpretation most generous to the petitioner, the proposed intrusion was unreasonable in terms of the fourth amendment. This Court's reading of Schmerber, however, is that the four factors petitioner identified in the opinion were not set forth as a test. Rather, the Schmerber Court was merely identifying elements of the situation before it that supported the conclusion that the intrusion in that case was constitutionally permissible.

Fourth amendment questions are peculiarly fact-specific, so it is not surprising to find that a court's decision rests on the particular facts before it. Yet the lower courts must carefully examine the Supreme Court's decisions and derive all available guidance from them. Sometimes the lower courts derive tests and doctrines from the Supreme Court's observation as to the facts of a specific case. To date,

however, apparently no federal court has extrapolated such a test from Schmerber. Indeed, the only federal case applying Schmerber to a surgical procedure, United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (en banc), cert. denied, 429 U.S. 1062 (1977), mentioned none of petitioner's asserted four factors, though it did examine some elements related to them, and this Court declines to enunciate a 'Schmerber doctrine' based on the Supreme Court's analysis of particular facts.

The Court will, however, apply the explicit holding of Schmerber:

> That we hold today that the Constitution does not forbid the State minor intrusions into an individual's body under stringently limited circumstances in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

384 U.S. at 772. And while the Court does

not find a litmus test in the Supreme Court's observations as to the facts before it, the Court does find some guidance as to the kinds of factors considered relevant to a determination of whether an intrusion is "minor" and performed "under stringently limited circumstances."

In the October 15 memorandum, this Court characterized the set of facts then before it as representing "essentially the permissible." The current set of facts exceeds that limit. Without repeating in detail the nature of the proposed procedure and the associated risks,[10] the Court simply observes that the totality of the factors involved constitutes a physical intrusion that is significantly greater than that previously contemplated, and the risks previously involved have increased in magnitude even as new risks are being added. While the evidence did not adequately quantify at least some of those risks,

the Court is satisfied that, taken together, they far exceed the level of "virtually no risk." Id. at 771. The Court concludes that an incision 5 cm long and 2.5 cm deep under general anesthesia to permit probing into and past muscle tissue simply cannot be characterized as a minor intrusion. Whether or not a surgeon would characterize the procedure as "minor surgery" is of no moment; there is no reason to suppose that the definition of a medical term of art should coincide with the parameters of a constitutional standard.

Schmerber essentially addresses only the extent and nature of physical intrusion, since that was basically all that was involved in the blood test there. However, the reasonableness of an intrusion turns also on the degree and manner of its interference with a person's privacy and dignity. In Rochin v. California, 342 U.S.

165 (1952), the Court made no reference to physical pain or risk in evaluating the constitutionality of the intrusion involved in pumping the petitioner's stomach to obtain the evidence lodged there. The Court simply said, "This is conduct that shocks the conscience." Id. at 172.

The Court does not here identify any single element of the proposed procedure as the linchpin to the Court's determination of the reasonableness of the intrusion, but the fact that general anesthetic is involved is very important to the Court's conclusion that the procedures shock the conscience. The Court is appalled at the prospect of government authorities rendering a person unconscious, cutting him open, and probing around inside his body for evidence which might, or indeed might not, aid them in convicting him of a crime. It cannot be said that such a procedure

involves "virtually no . . . trauma." Schmerber, 384 U.S. at 771.

The procedure contemplated here goes far beyond the prick of a needle in Schmerber, the slight intrusion in Crowder, and the minor procedure originally supposed to be required in this matter. The Commonwealth proposes to forcibly subdue petitioner by injection, make a substantial incision into his body, retract muscle tissue in an attempt to locate the subject bullet, and if successful in locating it, extract it from his body. All of this is to be done where the procedure is concededly not medically necessary for the preservation of petitioner's life and health. Considering the scope of the intrusion, the risks involved, and the affront to petitioner's dignity, the Court concludes the procedure contemplated is more akin to the impermissible activity

in Rochin than to the minor intrusion in Schmerber. In short, "These are methods too close to the rack and the screw to permit of constitutional differentiation." Rochin v. California, 342 U.S. at 172.

Considering together the type and extent of physical intrusion and the type and extent of intrusion on petitioner's privacy and dignity, the Court is satisfied that the proposed surgical procedure constitutes an unreasonable search within the meaning of the fourth amendment.

VI. Conclusion

The Court concludes that this action and all parties to it are properly before the Court. The Court further concludes that the proposed surgical procedure would constitute an unreasonable search in violation of petitioner's fourth amendment rights. Accordingly, the Court will permanently enjoin the procedure. While the parties have not raised the question, the Court concludes that

the petition does not state a claim against respondents Gerald L. Baliles and the Circuit Court of the City of Richmond, Virginia, Division I; accordingly, they will be dismissed.

An appropriate order will issue.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date Nov 12, 1982

FOOTNOTES

1 to the extent that this action arises under 42 U.S.C. § 1983, as well as being a petition for a writ of habeas corpus, petitioner might better be styled "plaintiff." However, in the interests of simplicity and consistency, the Court will refer to him as "petitioner," even in regar to matters relevant only to his §1983 claim.

2 In a habeas corpus proceeding under 28 U.S.C. § 2254 (d), factual determinations by a state court are "presumed to be correct," and this Court could not disregard such determinations without explaining its basis for overcoming the presumption of correctness. Sumner v. Mata, 449 U.S. 539 (1981). However, the Court has found that the state court made not such factual determinations. The only finding of the court that appears in the record is states as follows: "that there is no material change in circumstances that would require this Court to change Judge Lumpkin's previous order" (Tr. 86); "that there have been no material changes to warrant revoking or rescinding this Court's Order of August 25, 1982." These conclusions were additionally memorialized in the state court's order of October 21, 1982 (Respondents Ex.1). The Court has found that these statesments constitute a conclusion of law rather than a finding of fact.

Even if that conclusion is taken to be a factual determination for purposes of § 2254(d), the Court concludes that "such factual determination is not fairly supported by the record," 28 U.S.C. § 2254(d)(8), so that the presumption of correctness is over-

come. As appears from the Court's discussion infra, the Court concludes that the circumstances now before the Court justify imposition of the injunction requested, whereas the Court concluded on the circumstances previously presented, i.e., the circumstances on which Judge Lumpkin based the August 25 order to perform the surgical procedure, that the injuction should not issue. A fortiori, the Court considers the difference in circumstances material.

Under § 2254(d)(2), the presumption of correctness is overcome also if "the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing." Upon examination of the state court transcript and the affidavit of petitioner's counsel, filed October 21, 1982, the Court concludes that the procedures followed in the state court were conducted with such haste that the petitioner did not have a full and fair opportunity to litigate his claim there. At the October 21 hearing, petitioner's counsel protested that he had had only two days in which to prepare for the hearing, and in that short time he had been unable to interview all the witnesses, review all the medical records, research the medical and legal issues involved, and obtain the services of an expert anesthesiologist who could help prepare cross-examination of the hospital's anesthesiologist and could testify on petitioner's behalf. When the court took a midday recess, the court asked petitioner's counsel if he had any further evidence to put on. Petitioner's counsel represented that he would like to call an independent anesthesiologist who had had a chance to review the records and perform a "consult,"

but he could not have one available at two o'clock, when the court intended to continue. (Tr. 68-69). The court responded: "Well, we will hear him at two o'clock if you have him; otherwise we'll hear your argument." (Tr. 70). After the recess, petitioner's counsel made a proffer concerning an anesthesiologist he had contacted, but who was in surgery at two o'clock; he also noted his unsuccessful efforts to reach another anesthesiologist. (Tr. 70-71).

The record does not indicate any exigent circumstances leading the state court to curtail its inquiry; the Court must assume that the normal press of judicial business urged the state court to move the matter along expeditiously. While the Court appreciates and shares the concern that judicial proceedings must not be needlessly prolonged, the Court concludes that in this instance petitioner did not have a fair opportunity to prepare for the October 21 hearing. The Court has been impressed with the diligence, not to mention the legal skill, exhibited by petitioner's counsel, and the Court is satisfied that he did all that he could do or that a court could expect him to do during the two days he had in which to prepare for the October 21 hearing. He simply did not have adequate time to do his own preparation work, and it is not surprising that on such short notice he could not locate an expert anesthesiologist for whom the hearing date was available. Thus, "the factfinding procedure . . . was not adequate to afford a full and fair hearing" for purposes of 28 U.S.C. § 2254(d).

This conclusion also undermines respondends' contention that Stone v. Powell, 428 U.S. 465 (1976), prohibits the Court from reaching the merits of this matter. As the Court's October 15 memorandum explained, neither the holding nor the rationale of Stone v. Powell applies to the instant matter because this matter does not involve the exclusion or admission of evidence allegedly resulting from an unconstitutional search or seizure. But additionally, Stone v. Powell only precludes federal habeas corpus consideration of the merits "where the state has provided an opportuinity for full and fair litigation of a Fourth Amendment claim." Id. at 494. Petitioner received no such opportunity in the state court.

3 It is apparent the Court could not have concluded the § 1983 action was barred by res judicata since the state court findings were not before the Court for consideration at the time of the hearing.

4 In Mitchum v. Foster, supra, the Court noted:

> [W]e do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in Younger v. Harris, 401 U.S. 37, and its companion cases. They are principles that have been emphasized by this Court many times in the past.

407 U.S. at 243 (citations omitted).

5 See Younger, 401 U.S. at 43, 46.

6 It would appear doubtful the state court would entertain a motion to suppress based on an impermissible search inview of the possible re judicata/collateral estoppel effects of its prior determinations.

7 The Court is aware of no distinction between the meaning of "in custody" under § 2254(a) on the one hand and § 2241 on the other.

8 Although the language of Rule 2(b) and the accompanying Advisory Committee note clearly contemplates petitions attacing future custody generally, it might be argued the Committee had in mind the context where a current prisoner who faces future additional confinement on a different conviction seeks to collaterally attack that conviction. If the Committee would limit the procedure to that context, then the Committee's remarks do not support the Court's conclusion that the instant petitioner satisfies the "in custody" requirement. Of course, the Committee may have had that context in mind, if indeed it did, only because that context is most common one in which the issue of attacking furture custody arises, and not out of an intent to limit the procdure to that context.

Resort to the approach of the Supreme Court in Hensley provides a sounder basis for examining the custody question. It cannot seriously be contended that a meaningful distinction exists between the custody in which petitioner now finds himself and the unique custody to which he will be subjected

in the operating room. The surgical procedural will be conducted at the behest and under the authority of the Commonwealth, and will, therefore, be but part and parcel of the Commonwealth's current custody of petitioner. This being so, the Court comprehends no purpose to be served by constructing a metaphysical distinction between these 'custodies' where, in reality, none exists.

9 The findings of fact embodied in this section are derived entirely from the transcript of the state court proceedings of October 21. The Court finds the additional evidence submitted by the parties to be either cumulative or, in the case of the x-ray prints, incomprehensible. Thus, the Court's conclusion that the facts are materially different from those previously presented is based entirely on the state court record; in determining that the state court conclusion that there were no materially different circumstances was "not fairly supported by the record," see note 2 supra, the Court is looking at the same body of evidence.

10 See Part IV, supra, at 9-10.

IN THE UNITED STATES
DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RUDOLPH LEE, JR., Petitioner,	)	
v.	)	Civil Action
ANDREW J. WINSTON, et al., Respondents.	)	No. 82-0672-R

ORDER

Petitoner is granted leave to file the petition herein in forma pauperis.

In accordance with the memorandum of the Court this day filed and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED that petitioner's application for temporary restraining order, preliminary injunction, and permanent injuction be, and the same is hereby denied, and the petition for writ of habeas corpus stands dismissed.

Let the Clerk send a copy of this order and the accompanying memorandum to all

counsel of record.

UNITED STATES DISTRICT JUDGE/
Robert J. Merhige, Jr.

Date OCT 19, 1982

IN THE UNITED STATES
DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RUDOLPH LEE, JR., Petitioner,	
v.	Civil Action No. 82-0472-R
ANDREW J. WINSTON, et al., Respondents.	

MEMORANDUM

This matter came on for hearing on the instant Petition for Writ of Habeas Corpus and petitioner's application for a temporary restraining order, preliminary injunction, and permanent injunction on October 14, 1982. For the reasons set forth below, the application will be denied and the petition dismissed. This Memorandum embodies the Court's findings of fact and conclusions of law.

Since petitioner is in custody in Richmond City Jail pending trial, the Court does not have jurisdiction pursuant to 28

U.S.C. § 2254, as petitioner asserts; that section provides jurisdiction only if the petitioner is in custody pursuant to a judgment of a state court. However, because the petitioner contends that he is in custody in violation of the Constitution, the Court does have jurisdiction over this calim pursuant to 28 U.S.C. § 2241(c)(3). The Court has jurisdiction over petitioner's claim under 42 U.S.C. § 1983 pursuant to 28 U.S. § 1343(3).

I. Factual Background

The facts as they appear from petitioner's pleadings and the transcript of the proceedings[1] in the Virginia trial court may be briefly summarized as follows:

Petitioner has been charged with malicious wounding, attempted robbery, and use of a firearm in the alleged commission of these two felonies.[2] On July 21, 1982 The Commonwelath's Attorney for the City

of Richmond filed a Motion to Compel Evidence, seekin to recover a bullet lodged in petitioner's left chest. The Circuit Court conducted an evidentiary hearing on the motion beginning on July 22, 1982 and continuing on August 2, 11, and 25, 1982. At the conclusion of such hearing, the court entered its findings from the bench, concluding essentially that petitioner had been given a full opportunity to present his claim, the Commonwealth had demonstrated need for the bullet as evidence and could not obtain the same evidence from another source, and removal of the bullet would involve only a minor surgical procedure with virtually no threat of permanent injury to petitioner. (Tr. 109-111). Accordingly, the Circuit Court granted the Commonwealth's Motion to Compel Evidence, but stayed enforcement of the order to allow petitioner to undertake appropriate

appellate review of the matter. Subsequently, on October 13, 1982, the Supreme Court of Virginia denied petitioner's Petition for Writ of Habeas Corpus and/or Writ of Prohibition. Thereafter, petitioner brought the instant Petition for Writ of Habeas Corpus.

II. Issues Presented

Petitioner asserts that the Circuit Court's order subsetaining the Motion to Compel Evidence deprives him or rights, privileges, and immunities secured by the fourth and 14th amendments to the U.S. Constitution. For his habeas corpus claim, petitioner alleges that the order will require additional custody in that he will have to be in custody and restrained by the respondent Sheriff or his agents for the bullet to be surgically removed in a hospital. For his § 1983 claim, petitioner alleges that the conduct complained of was

and will be engaged in under color of state law.

As noted supra, the Court held a hearing on October 14, 1982 after notice to respondents. Respondents were present and took part in the hearing; the Court accepted into evidence the transcript and other documentary evidence of the proceedings in the Circuit Court and the Virginia Supreme Court. Accordingly, the petitioner need not satisfy the conditions of Rule 65(b), Fed. R. Civ. P. for an ex parte application for a temporary restraining order. See Haines v. City of Danville, 337 F.2d 579 (4th Cir. 1964), aff'd mem., 384 U.S. 990 (1966)(per curiam). When such a hearing is conducted, the procedure for considering an application for a preliminary injunction, and the distinction between the two forms disappears. See Dilworth v. Riner, 343 F.2d 226 (5th Cir. 1965); 11 C. Wright &

A. Miller, Federal Practice and Procedure § 2951, at 449-500 & nn. 81-83 (1973). Were the Court to grant a preliminary injunction, the Court concludes that petitioner is not entitled to the relief sought.

The standard for a preliminary injunction in the Fourth Circuit is the balance-of-hardship test, whereby the district court's decision must be

> based upon a flexible interplay of the four factors to be considered: (1) the likelihood of irreparable harm to the plaintiff without the temporary injunction; (2) the likelihood of harm to the defendant with the injunction; (3) plaintiff's likelihood of success on the merits; and (4) the public interest.

Telvest, Inc. v. Bradshaw, 618 F.2d 1029, 1032 (4th Cir. 1980); see Maryland Undercoating Co. v. Payne, 603 F.2d 477 (4th Cir. 1979); Blackwelder Furniture Co. v. Seilig Manufacturing Co., 550 F.2d 189

(4th Cir. 1977].

"A future injury of uncertain date and incalculable magnitude is irreparable harm." Phillips v. Crown Central Petroleum Corp., 602 F.2d 616, 630 (4th Cir. 1979], cert. denied, 444 U.S. 1074 (1980). In the instant case, petitioner faces a future injury of relatively certain date. The magnitude of the physical injury is also fairly certain-it is expected to be slight-as the Court's discussion infra reveals. The magnitude of the injury to petitioner's dignity from the proposed intrusion into his privacy is not, however, so certain. In sum, the Court concludes that petitioner faces a nominal risk of irreparable physical harm, see infra, and a not insubstantial risk of irreperable harm to his dignity.

The anticipated harm to the respondents is that they will be deprived of potential evidence at the time of trial on petitioner's

criminal charges. The likelihood of such harm is conditioned on several factors now uncertain to varying degrees: whether the object in petiioner's shoulder is a bullet; if so whether the bullet will be identifiable when removed; if so, whether the evidence will be useful at trial. It is also uncertain whether the delay occasioned by an injunction would cause an otherwise identifiable bullet to deteriorate to the point of being unidentifiable due to the corrosive effect of body fluids. (Tr. 52-57). In sum, the Court finds the likelihood of harm to the respondents resulting from an injunction to be uncertain, but not negligible.

The Court will reserve discussion of petitioner's likelihood of success on the merits and consider the element of the public interest. At the risk of stating the axiomatic, the public interest is that justice be done-particularly in petitioner's

criminal trial. Recovering and identifying the bullet could serve to exonerate the petitioner. If the bullet amounts to useful evidence for either side, it serves the public interest in justice, since the finder of fact presumably can better reach a just result if given more useful information. On the other hand, nearly 200 years of American jurisprudence under the Bill of Rights support the principle that protecting the rights guaranteed therein amounts to justice. In sum, the Court cannot conclude that the public interest in justice would be better served by either the granting or the denial of the injunction.

Similarly, consideration of the likelihood of irreparable harm to the petitioner without the injunction and the likelihood of harm to the respondents with the injunction does not yield a clear indication

of the balance of the hardships. Accordingly, the "flexible interplay" of the factors depends heavily on plaintiff's likelihood of success on the merits.

III. Stone v. Powell

Before reaching the merits of petitioner's claim that the proposed surgery will violate his fourth amendment rights, the Court must address respondents' contention that Stone v. Powell, 428 U.S. 465 (1976), precludes the Court from reaching the merits. That case, of course, limits the substantive scope of federal habeas corpus review, holding that when a state prisoner asserts that the state trial court failed to exclude evidence that the prisoner alleges came from an unconstitutional search or seizure, the federal court is only to inquire into whether the state had provided the prisoner an opportunity for a full and fair litigation of his or her claim. Id. at 481-82.

Both theholding and the rationale of Stone v. Powell are very closely tied to the practice and principles surrounding the exclusionary rule. On both occasions when the Court explicitly framed the question presented, it did so in terms of the introduction or exclusion of allegedly tainted evidence at trial. See id. at 469, 489. The holding was expressed in the same terms. See id. at 481 ("[W]e conclude, in light of the nature and purpose of the Fourth Amendment exclusionary rule. . . "); id. at 481-82, 494-95.

In Part III of the opinion, id. at 482-89, the Court traced the history and rationale of the exclusionary rule. "The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights." Id. at 486. The Court concluded that this purpose would not be substantially furthered by

federal habeas corpus review of state court convictions, since the connection between the police misconduct and the eventual result would be so attenuated. Id. at 493.

By contrast, the instant petition affords the Court the opportunity to offer guidance to law enforcement officals before they undertake the propsed search. Rather than deciding ex post whether evidence should have been excluded as illegally obtained, the Court can decide ex ante whether obtaining the evidence would be illegal. To borrow the terminology of punishment theory, the exclusionary rule promises at best general deterrence: the theory is that law enforcement officals will be deterred from making illegal searches in other cases because of the result that followed in a particular case. By contrast, in the instant case, the Court can, if necessary, provide special deterrence, as

no way indicates that it permits more substantial intrusions, or intruisons under other conditions." Id. at 772 (emphasis added). Thus, this Court must determine whether the proposed intrusions would be minor and the proper limiting conditions met.

The Court notes at the outset that the instant case presents a most troubling fact situation. The proposed intruison takes the form of an incision of about 1.5 centimeters in length to remove an object approximately 0.5 centimeters beneath the skin. (Tr. 64-65). In sheer physical terms, this procedure obviously involves a greater intrusion than that required for the taking of a blood sample in Schmerber. As explained infra, the Court concludes that the particular facts before the Court do not constitute an impermissilby great intrusion under the terms of Schmerber.

However, the Court stresses that the instant situation appears to represent essentially the limit in the degree and kind of intrusion constitutionally permissible.

Before proceeding to the Schmerber analysis, the Court notes that in United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976)(en banc), cert. denied, 429 U.S. 1062 (1977), apparently the only federal case applying Schmerber analysis to a sergical procedure, the court approved a removal of a bullet under conditions very similar to those in the instant case. Petitioner contends that the Crowder court did not correctly apply Schmerber; he derives from Schmerber a four-part test to determine whether an intrusion is unreasonable. The test petitioner proposes represents essentially the most generous (to petitioner) possible reasonable reading of what Schmerber requires. In the interest of

well as general deterrence: it can deter the very search in question, as well as guide future searches. Accordingly, the Court will proceed to the merits of petitioner's fourth amendment claim; respondents' assertion is rejected.

IV. Fourth Amendment Analysis- Proper Standard

The petitioner rests his claim of deprivation of fourth amendment rights on Schmerber v. California, 384 U.S. 757 (1966). In that case, the Supreme Court approved the taking of blood from the defendant without his consent so that his blood alcohol content could be determined. However, the Court stressed that they "reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we hold today that the Constitution does not forbid the State minor intrusions into an individual's body under stringently limited conditions in

giving full consideration to petitioner's claim, the Court will assume, without deciding, that petitioner correctly characterizes the significance of Schmerber and that Crowder is not controlling.

V. Fourth Amendment Analysis- Applying Schmerber

As petitioner reads Schmerber, 384 U.S. at 770-72, a court that is deciding whether an intrusion is unreasonable is to examine whether: (1) there was a need for the evidence; (2) there was a clear indication the evidence would be found; (3) the procedure was a minor one with "virtually no risk, trauma, or pain;" and (4) the procedure was reasonably carried out in a hospital environment by medical personnel.

To apply the test, the Court must examine the facts on the record. The medical testimony in the Circuit Court indicated that the proposed surgery would be performed under local anesthetic. The doctor

who testified characterized the procedure as "minor surgery." As noted supra, the incision would be 1.5 cm in lenght and deep enough to remove an object 0.5 cm beneath the surface of the skin. The object is now far from the nerves and arteries, so the chances of harming such structures by the surgery are "almost zero," according to the doctor. He testified that the chance of harming the patient by the procedure was perhaps one in 10,000 or one in 100,000; however, the danger in leaving the bullet, "if it doesn't produce any pain or other problem," is probably zero. Thus, the doctor concluded that it was more dangerous to the patient to remove the bullet than to leave it. (Tr. 15-25, 63-71).

Petitioner challenges the first element of the test on the ground that the Commonwealth claims to have an eyewitness (the victim) who will positively identify the petitioner. Thus, petitioner contends that

the specific evidence is not needed. Respondents assert that the evidence is necessary to rebut petitioner's claim that the bullet came from a different gun. The Court concludes that the respondents have established a need for the specific evidence. Petitioner does not suggest that there must be a compelling need, and the Court cannot say that there is not any need for it, that it would be merely cumulative.

Petitioner also challenges the "need" element more generally, asserting that the proposed procedure is much more rare than the blood sampling approved as a routine procedure in Schmerber, and that blood alcohol determinations are more necessary to prosecuting drunk driving violations than ballistics determinations are to other types of prosecutions. There is no evidence before the Court to support such assertions. The Circuit Court specifically found the "need"

element satisfied, both specifically and generally. (Tr. 112-13). It seems at least equally plausible as not that when the procedure is an relatively simple as the one proposed, the routine practice is to undergo the surgery, even if that is slightly more risky than leaving an object embedded under the skin. Similarly, there is no apparent reason to doubt the general usefulness of ballistics information, whether or not the bullet involved was ever lodged in a human body.

As to the second element, there is apparently no doubt that a foreign object is lodged in petitioner's shoulder, and there is substantial evidence that the object is probably a bullet. The only real question is whether the bullet will amount to evidence. Given the possibility that the bullet will be unidentifiable, it is not <u>certian</u> that evidence will be found.

But the Court is satisfied that there is a "clear indication" that evidence will be found, beyond a "mere chance," Schmerber, 384 U.S. at 770. As the Circuit Court noted (Tr. 112), petitioner apparently does not seriously challenge either this factor or the fourth, that the procedure would be performed in a hospital.

The element petitioner challenges most strongly, and the one of greatest concert to the Court, is the third: whether the procedure involves "virtually no risk, trauma, or pain," Schmerber, 384 U.S. at 771. The Circuit Court also explicitly found this element satisfied (Tr. 110, 112), and this Court concludes likewise. As noted supra, the doctor did testify that the risk was greater thatn the risk involved in leaving the bullet, though he also quailified his assessment of the latter risk by saying "if [the bullet] doesn't produce any pain

or other problem." But he estimated the risk of the procedure as perhaps one in 10,000 or one in 100,00. "Virtually no risk" does not mean "absolutely no risk." While the Court declines to attept to establish any specific guidelines as to what quantity of risk constitutes "virtually" none, it does find that the uncontroverted evidence in the instant case establishes that the proposed procedure can be carried out with virtually no risk to the petitioner.

The Court concludes that the precise facts before it do not establish an unreasonable intrusion into petitioner's privacy under the terms of Schmerber. Accordingly, the Court concludes that petitioner is not likely to prevail on the merits of his claim that his fourth amendment rights would be violated by the proposed surgery. This conclusion applies

to both the habeas corpus claim and the § 1983 claim.[4]

VI. Setting of Bond

At the hearing of August 2, 1982, the Commonwealth's Attorney moved to increase petitioner's bond from $10,000 to $50,000. The Circuit Court raised the bond to $30,000 and declined to reverse itself at the hearing of August 25, 1982. Petitioner asserts that in raising the bond, the Circuit Court considered only the possibility that petitioner would destroy the evidence, which petitioner says is not a permissible basis for setting bond under Va. Code § 19.2-121.

The Petition and accompanying Memorandum do not make clear whether petitioner raises this claim as a means for establishing his custody for purposes of his habeas corpus claim or as a separate deprivation of constitutional rights. If his purpose is the former, the Court need not consider the

contention, as the Court has accepted for purposes of the habeas corpus claim petitioner's assertion that he would be in the custody of the Sheriff or his agents at the time of the surgery.

If petitioner's purpose is the latter, his claim is unsupported by the record. At the August 25 hearing, the Circuit Court clearly indicated that it was taking into account the factors related to insuring the presence of the accused, as Va. Code § 19.2-121 directs. The Circuit Court also gave petitioner full opportunity to put on evidence as to such factors. (Tr. 104-06, 113-22). Whether or not the Circuit Court erred in raising the bond on August 2, it has now given full consideration to the appropriate factors for setting bond. Petitioner has not demonstrated that his current confinement violates the Constitution.

VII. Conclusion

The Court concludes that petitioner has not justified the imposition of a preliminary injunction in light of the four factors enunciated in Telvest, Inc. v. Bradshaw, supra. In the instant case, the critical factor is the likelihood of prevailing on the merits. The Court is satisfied that the likelihood that petitioner will so prevail is too slight to cause the interaction of the four factors to be resolved in his favor.

An appropriate order will enter.

/s/ Robert A. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date Oct. 15, 1983

1 Much of what appears in the transcript may be based on hearsay testimony; however, the operative facts bearing on the question before this Court do not appear to be based on hearsay. Accordingly, the Court has no occasion to consider the possibly hearsay nature of certain background facts as set forth in this footnote.

In the early morning hours of July 18, 1982, Ralph E. Watkinson was locking the door of his business, the Lombardy Market, when he observed a man ("the assailant") approaching him with a gun in his hand. As the assailant approached Watkinson, the latter drew his own pistol. When the assailant yelled at Watkinson to "freeze," Watkinson fired two shots. The assailant returned fire, striking Watkinson once in each leg. Thereafter, the assailant fled into a nearby alley. Watkinson was transported by ambulance to the Medical College of Virginia.

Shortly after the police arrived at the scene of the shooting, another police car responded to the area and the police officers in this latter car found the petitioner, Rudolph Lee, Jr., approximately eight blocks from the scene of the shooting with a gunshot wound in the left chest area. Petitioner was also transported by ambulance to the Medical College of Virginia.

2 Indictments in these matters were returned by a grand jury of the Circuit Court of the City of Richmond, Division I, on September 7, 1982 (Case No. F-82-1417 to 1420).

3 Petitioner finds the Crowder application faulty because: the Crowder court looked for only probable cause for the search, whereas Schmerber required "a clear indication that in fact such evidence exists," 384 U.S. at 770; the Crowder court failed to consider the need for the evidence, as Schmerber did, id. at 770-71; and to determine whether the operation was minor, the Crowder court looked at the risk of permanent injury, whereas the Schmerber court looked to see that there was "virtually no risk, trauma, or pain," id. at 771.

4 Accordingly, the Court need not consider respondents' contention that Allen v. McCurry, 449 U.S. 90 (1980), bars this Court's consideration of the merits of petitioner's § 1983 claim.

JOINT

APPENDIX

Office Supreme Court, U.S.
FILED
JUN 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1334

In The

Supreme Court of the United States

October Term 1983

ANDREW J. WINSTON

and

AUBREY M. DAVIS, JR.,

Petitioners,

v.

RUDOLPH LEE, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed December 13, 1983
Certiorari Granted April 16, 1984

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(NOTE: The record contains transcripts from three different courts; their pages were marked with a letter prefix corresponding to the residing judge's name: for Judge Lumpkin: L-____; for Judge Nance: N-_____; for Judge Merhige: M-_____.)

RELEVANT DOCKET ENTRIES OF UNITED STATES DISTRICT COURT

RUDOLPH LEE, JR., Petitioner, v. ANDREW J. WINSTON, et al., Respondents.) Civil Action No. 82-0672-R

DATE	ENTRY
October 13, 1982	Petiton for Writ of Habeas Corpus and Application for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction, filed.
October 14, 1982	IN OPEN COURT: MERHIGE, J. MATTER CAME ON FOR HEARING ON PLTF'S MOTION FOR A TRO. MOTION HEARD; TAKEN UNDER ADVISEMENT BY THE COURT. (50 MINS.)
October 15, 1982	Memorandum of Court, filed.
October 15, 1982	ORDER

October 21, 1982	Motion for a New Trial filed by the Petitioner.
October 22, 1982	IN OPEN COURT: WARRINER, J. MATTER CAME ON FOR HEARING AFTER EXHAUSTION OF STATE REMEDIES BY PETITIONER. COUNSEL HEARD. COUNSEL FOR RESPONDENTS TO PRESENT TRANSCRIPT WITHIN A WEEK OF STATE HEARING FOR DETERMINATION & REPRESENTATION MADE BY RESPONDENTS THAT NO ACTION WILL BE TAKEN BEFORE THEN. (:41)
October 28, 1982	Petitioner's Motion, filed.
November 1, 1982	IN OPEN COURT: MERHIGE, J. MATTER CAME ON FOR HEARING ON PETITIONER'S MOTION TO REOPEN PREVIOUS PETITION & FOR A TRO. MOTION HEARD; GRANTED. COURT TO ENTER INJUNCTION ENJOINING RESPONDENTS, IF NECESSARY, FROM PERFORMING OPERATION ON MR. LEE UNTIL COURT HAS FULLY HEARD MATTER. HEARING SET FOR NOV. 8, 1982 AT 9 AM.

(1 HOUR 13 MINS.)

November 2, 1982	ORDERED that respondents Winston and Davis are restrainted and enjoined from removing the object located in petitioner's chest without his consent; this injuction shall remain in effect for a period of 10 days; it is also ADJUDGED and ORDERED that petitioner is enjoined from destroying or disposing of the object; a hearing on petitoner's prayer for a preliminary injunction shall be conducted beginning at 9:00 a.m. on November 8, 1982, ENT 11-01-82 nunc pro tunc 11-01-82 at 5:34 p.m., RRM, JR., filed.
November 8, 1982	IN OPEN COURT: MERHIGE, J. MATTER CAME ON FOR AN EVIDENTIARY HEARING. PETITIONER ADDUCED EVIDENCE; R CASE CON'D UNTIL 11-10-82 AT 9:30 A.M. FOR FURTHER PROCEEDINGS. (47 MINS.)

November 8, 1982	X-rays lodged pursuant to subpoena ducus tecum by Radiology Dept., MCV.
November 8, 1982	Medical records of Petitioner's hospitalization at MCV lodged pursuant to subpoena ducus tecum.
November 10, 1982	IN OPEN COURT: MERHIGE, J. MATTER CAME ON FOR FURTHER HEARING ON PETITIONER'S MOTION FOR A PRELIMINARY HEARD. UPON CONCURRENCE OF COUNSEL FOR PARTIES THIS MATTER WILL BE TREATED BY THE COURT AS CASE ON MERTIS. MATTER TAKEN UNDER ADVISEMENT BY THE COURT. (42 MINS.)
November 11, 1982	ORDER extending injunction for no longer thatn 10 das ent 11-11-82, RRM, JR, 4:25 pm, filed.
November 12, 1982	Memorandum of the Court filed.
November 12, 1982	ORDER filed.
November 23, 1982	Notice of Appeal of Andrew J. Winston, Sheriff and Aubrey M. Davis, Jr., filed.

RELEVANT DOCKET ENTRIES OF UNITED STATES CIRCUIT COURT OF APPEALS AND LIST OF IMPORTANT DATES

RUDOLPH LEE, JR., Appellee	:	
v.	:	No. 82-6762
ANDREW J. WINSTON, Sheriff; AUBREY M. DAVIS, JR., Appellants	:	

DATE	ENTRY
November 29, 1982	Case Docketed. ROA filed.
March 9, 1983	Case argued by counsel.
September 14, 1983	Opinion affirming in part and vacating in part the decision of USDC, decided 9/14/83, filed.
September 14, 1983	Judgment affirming in part and vacating in part the decision pf USDC, filed.

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF RICHMOND, DIVISION I

COMMONWEALTH OF VIRGINIA

v.

RUDOLPH LEE, JR.

MOTION TO COMPEL EVIDENCE

Comes now the Attorney for the Commonwealth for the City of Richmond and moves the Court as follows:

(1) That upon reliable facts produced by an investigation by the Richmond Bureau of Police of the City of Richmond, there exists probable cause to believe that the defendant, Rudolph Lee, Jr., has in this jurisdiction committed the felonies of attempt[ed] robbery, use of a firearm in the commission of an attempt[ed] robbery, malicious wounding and use of a firearm in the commission of malicious wounding.

(2) That the Commonwealth of Virginia

must prove each of the above mentioned charges beyond a reasonable doubt.

(3) That in order to establish proof beyond a reasonable doubt the Commonwealth of Virginia requires for the purpose of ballistics examination a bullet embedded in the left front chest area of the defendant.

(4) That said materials will be employed for the purpose of identification and not for testimonial or communicative evidence so as to violate any of the defendant's Fifth Amendment [r]ights. United States v. Dionisio, 410 U.S. 1 (1973) (voice exemplar); Gilbert v. California, 388 U.S. 263 (1967) (handwriting exemplar); Schmerber v. California, 388 U.S. 757 (1966) (blood sample); Missouri v. Overstreet, 551 SW 2nd. 261 (1977) (bullet removed by surgery); and United States v. Crowder, 543 F.2d 312 (D.C. Circuit 1976), cert. denied, 429 U.S. 1062, 97 S.Ct. 788, 50 L.Ed.

2d. 779 (1977) (bullet removed by surgery); Creamer v. Georgia, 192 SE 2d. 350 (1972), cert. dismissed, 410 U.S. 975 (1973) (bullet removed by surgery).

(5) That in the cases cited as authority for compelling physical specimens and other evidence from a defendant, the Courts countenance warrantless seizures of such evidence.

(6) That the defendant is being treated by Dr. Picon Mendize (sic), Medical College of Virginia Hospital, who represents that removal of said bullet will not in any way endanger the life of the defendant or cause any unnecessary damage to the defendant.

(7) That said materials are relevant evidence and cannot be obtained in any other way, and there exists probable cause to believe that the operation would produce it.

(8) That the operation is minor surgery, to be performed by a skilled surgeon, with

every possible precaution taken to guard against any surgical complication, so the risk of permanent injury is minimal.

THEREFORE, the Commonwealth of Virginia respectfully prays that the Court Order the defendant to present himself at a time and at a suitable place designated by the Commonwealth to have said bullet removed and turned over to the Richmond Bureau of Police.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By /s/ Aubrey M. Davis, Jr.

Aubrey M. Davis, Jr.
Commonwealth's Attorney
800 East Marshall Street
Richmond, Virginia 23219

VIRGINIA:

IN THE CIRCUIT COURT

OF THE CITY OF RICHMOND,

DIVISION ONE

COMMONWEALTH OF VIRGINIA

v.

RUDOLPH LEE, JUNIOR

* * * * * * *

[L-3] Hearing on July 22nd, 1982, before the Honorable James M. Lumpkin, Judge.

PRESENT: Aubrey M. Davis, Jr., Esq., Attorney for the Commonwealth

Harvey A. Goodman, Esq., Attorney for the defendant

* * * * * * *

[L-6] STEVE A. DALTON

* * * * * * *

DIRECT EXAMINATION

BY MR. DAVIS:

* * * * * * *

A. Steve A. Dalton, Richmond Bureau of Police, Detective, assigned to the Detective Division.

Q. All right, as such, were you in your capacity as a police detective or were you assigned to investigate the alleged robbery of the Lombardy Market at 201 North Lombardy Street?

A. Attempt robbery, yes, sir, that's correct.

Q. All right, would you relate to the Court what your investigation revealed?

A. Yes, sir, my investigation reveals that on July the 18th, 1982, at approximately 12:55 a.m., Sunday morning, Ralph E. Watkinson (spelling) W A T K I N S O N, the owner of Lombardy Market at 201 North Lombardy Street, was closing his business for the night.

[L-7]

He had walked out of the door and was locking the door when he observed a subject coming towards him with a gun in his hand from across Lombardy Street going from the west side of the street to the east side where the market is located.

As he came closer, Mr. Watkinson drew his pistol out, a .32 caliber pistol, the subject hollered at Mr. Watkinson to freeze. At that time Mr. Watkinson fired two shots plus he had one misfire and --

THE COURT: Wait a minute, who fired?

A. Mr. Watkinson.

THE COURT: All right.

A. The alleged assailant also returned fire striking Mr. Watkinson once in both legs.

I interviewed Mr. Watkinson and he stated that on his first shot the subject

went -- beared to the left but kept advancing at him. In other words, as if the bullet had hit him in the left side he jerked his left side around but kept firing, then ran east in the alley from the scene.

The police log time on the -- this shooting at 201 North Lombardy was 1:04 and at 1:13 a.m., in the twenty-two hundred block of Parkwood Avenue another police car was logged and police officers responded to that area and found [L-8] a Rudolph Lee, Junior, with a gunshot to the left chest area.

THE COURT: How far was this from the Lombardy Market?

A. It would be approximately eight blocks.

THE COURT: All right.

A. Rudolph Lee, Junior, and the victim, Mr. Watkinson, both were trans-

ported to MCV in separate ambulances.

Mr. Watkinson was already in the Emergency Room at the Medical College of Virginia when the ambulance personnel brought in Rudolph Lee, Junior.

At that time Mr. Watkinson looked at him and said that's the man that shot me and they were separated into different rooms. I interviewed Mr. Watkinson the night of this offense and then again on July 20th at his home where he had been released from the hospital.

He related the same incident to me on both occasions as to what occurred and his identification of Mr. Lee in the Emergency Room. It was not a planned type of identification, the two calls had not been connected by the uniformed officers, they were both just coincidentally placed in the same emergency room on the night of the offense.

[L-9]

BY MR. DAVIS:

Q. Were they placed in there by the medical personnel and not by the police?

A. Yes, sir, that's correct.

Q. All right?

A. The investigation -- it was determined that Mr. Lee had a vehicle that he was using that night.

It was a Mercury Monarch with Maryland license on it, EGF 593, that vehicle was located at Shields and Parkwood which is right at the twenty-two hundred block and that was located the following -- well, the same date, July the 18th, later on in the morning.

Q. In relationship to where he was shot, that was the same block or further away

A. He was --

Q. or where he was found, excuse me?

A. He was found right on the corner of Shields and Parkwood and the vehicle was parked one car space back from Parkwood on Shields.

THE COURT: How far away from where he was found?

• • • • • • • •

A. No more than twenty feet.

[L-10]

• • • • • • • •

BY MR. DAVIS:

Q. The Lombardy Street Market is located in the City of Richmond?

A. Yes, sir, north of the James River.

• • • • • • • •

CROSS EXAMINATION

BY MR. GOODMAN:

Q. Detective Dalton, Mr. Watkinson was shot where?

A. He was shot once in both legs in

the upper --

Q. At what address?

A. At 201 North Lombardy Street, it would be in front of the business.

Q. And Mr. Lee was found where?

A. The twenty-two hundred block of Parkwood Avenue.

Q. And how far is that?

A. Approximately eight blocks.

[L-11]

Q. You say Mr. Watkinson was closing up his business and what did he see?

A. He observed a subject coming across the street in the corner of his eye and he observed the gun, so he drew his gun and turned around --

Q. Did he say how the gun was held?

A. The subject was holding it in his hand, that's all.

Q. He said the subject was holding the gun in his hand

A. Yes, sir.

Q. and Mr. Watkinson saw him and drew his gun?

A. Yes, sir.

Q. Before this, had the subject said anything?

A. No, this is when both guns -- when he turned around with his gun the subject told him to freeze and that's when the shooting began.

Q. And the subject then started running after he got shot?

A. After the gun battle, yes, sir.

Q. Mr. Watkinson called the police and they logged it in at 1:04?

[L-12]

A. The -- I don't know exactly who called the police but the call was logged in at 1:04 a.m.

Q. Saying what, that there had been a shooting?

A. That there had been a shooting.

Q. All right, and then at 1:13 Mr. Lee was found?

A. At 1:00 -- another police call was logged in at 1:13 a.m., of a shooting in the twenty-two hundred block of Parkwood Avenue.

Q. I'm sorry, I didn't understand, what happened at 1:13?

A. That's the police log time of the shooting of Rudolph Lee, Junior.

Q. But what did it say, that he was shot?

A. It just came in and said a shooting and --

Q. Not that there was another shooting at twenty-two hundred block but that somebody was shot?

A. Yes, sir, that's correct?

Q. Which is correct?

A. Okay, the police call came in of

a man shot in the twenty-two hundred block of Parkwood Avenue.

[L-13]

Q. A man shot in the twenty-two hundred block?

A. The exact wording on the way the call was dispatched I do not know.

Q. All right, then Mr. Watkinson and Mr. Lee were both brought to the Emergency Room and Mr. Watkinson said that's the man who shot me?

A. Yes, sir, as they rolled him into the Emergency Room together.

Q. Did he say how far away he was from where the shooting occurred when he got shot and --

A. Are you talking about the distance between the two parties?

Q. Yes, uh huh?

A. In his interview on July the 20th he stated that there were approximately

ten feet apart -- ten to fifteen feet apart.

Q. Approximately ten to fifteen feet apart?

A. Yes, sir.

Q. And what were the lighting conditions there, do you know?

A. I don't know.

Q. And what kind of market is this, is [L-14] this a supermarket?

A. It's more of a delicatessen type market.

Q. Is it open until one o'clock at night or do you know?

A. I don't know, he was closing the business at the time this incident happened.

* * * * * * * *

BY THE COURT:

Q. Are they both in the hospital today?

A. No sir, Mr. Watkinson has been released and is at home.

Q. And is he still under medical care, to your knowledge?

A. To my knowledge, yes, sir.

Q. All right, and the -- and Rudolph Lee, Junior is in the hospital?

A. Yes, sir.

Q. What hospital?

A. MC -- the Medical College of Virginia.

* * * * * * *

[L-15] G. MENDEZ PICON

* * * * * * *

DIRECT EXAMINATION

BY MR. DAVIS:

Q. Doctor, for the record, would you state your name and your employment please?

A. Doctor G. Mendez-Picon, I'm an Associate Professor of Surgery at the

Medical College of Virginia.

Q. All right, would you relate to the Court your education background in the medical profession?

A. Yes, sir, I went to medical school in Spain, in Santiago, I did an internship in Madrid, I did another internship at the University of Kansas.

I did five years of training at the Medical College of Virginia and since 1974 I'm of the faculty at the Medical College. I'm certified in surgery and I'm a Fellow of the American College of Surgeons.

MR DAVIS: Judge, would the Court like to have -- have some questions to ask Doctor Picon?

MR. GOODMAN: I'll stipulate his [L-16] qualifications as an expert.

THE COURT: I wonder -- I'm fully satisfied of his qualifications as

an expert. I wonder if it would be helpful to -- do you have any idea how many surgical procedures you've performed or participated in?

A. So far this year I have done two hundred and twenty-five.

I usually do four hundred a year and I've been taking care of the Emergency Room at the Medical College about seven days out of the month for the last -- since 1974 initially involving about thirty or forty gunshot wounds a year.

THE COURT: All right, thank you.

BY MR. DAVIS:

Q. Doctor are you familiar with an individual by the name of Rudolph Lee, Junior?

A. Yes, sir.

Q. And in what capacity?

A. Mr. Lee, Junior, was a patient who

was brought to the Medical College after suffering a gunshot wound of a small caliber, I would say in the upper portion of his left chest, and if I remember correctly, he was admitted on [2-17] Sunday night.

Upon admission the patient underwent an arteriogram which is an x-ray to try and determine whether the blood vessels of the area where the bullet entered had been damaged.

The arteriogram was normal and there was no major nerves who were -- which were injured. On the basis of that, at that point no surgery was indicated and the patient was admitted to the hospital for observation where he still is at the present time.

BY MR. DAVIS:

Q. Doctor, the purpose of this hearing is that the Commonwealth has filed

a motion with the Court To Compel Evidence and that is to have the bullet removed from the individual. Rudolph Lee, Junior, could you relate to the Court what your opinion is in regard to -- of the dangers to the patient from a life standpoint or from a permanent injury, unnecessary suffering and so forth?

A. Okay, Your Honor, the bullet is approximately -- if I may take off my jacket I will show you better.

* * * * * * * *

[L-18]

A. Your Honor, the bullet entered approximately at the clavicular line which is right here underneath the collar bone.

For the type of injury I would suspect that there was some slight angle to the bullet entrance and the bullet is located somewhere around this area

(witness indicating).

In the lateral view you can see that the bullet is ahead, a little bit anterior to the arm bone, in other words, the bullet is somewhere around here, it's not posterior.

In order to remove that bullet, an incision has to be made somewhere around here (indicating) and the only problem that we don't know is whether the bullet or what relationship between the bullet -- what relationship between the bullet and the nerves and that would be the only damage that could be expected if surgery is performed.

When you always operate around nerves you're going to have a three to four percent chance of [L-19] damaging those nerves by moving them, retracting them, doing anything to them.

As far as a life threat to the patient, to remove that bullet I say will

carry a mortality less than zero point one percent which is a mortality quoted for orthopedic procedures of that nature.

THE COURT: Less than zero point one?

A. Yes, zero point one, that is the mortality life threat.

Now, permanent injury is hard to quote but I will say that he has a -- maybe just to say something a one percent of having some degree of nerve damage.

I want to also state, Your Honor, if I may, that the gentleman at the present time after last night when I saw him last, he still has some tenderness and soreness in that shoulder, so the full range of motion present at this time is difficult to ascertain.

BY MR. DAVIS:

Q. Doctor, what is the -- I guess you've already answered the question but

I'll ask it anyway, what is the percentage he'll have permanent damage as a result of the bullet being left in there to --

A. That's another point that I would [L-20] also like to make is that if the -- there is still a small chance and I cannot put a figure but I usually say five percent, that the bullet may be -- may produce some damage and it may have to be removed but unfortunately we will not know that until maybe two or three weeks to see how the patient recovers.

THE COURT: I'm confused, I thought you had said five percent -- well, that was as to permanent injury?

A. Yes.

THE COURT: And what -- and one percent -- what is this five percent?

A. Five percent is the chances that the bullet will have to be removed for

strict medical reasons because it may produce pressure on the nerves.

It's very hard to tell at the present time because the patient still doesn't fully move his arm, so we don't know whether we'll have to do something or not.

THE COURT: All right.

BY MR. DAVIS:

Q. Will it necessitate the patient being hospitalized during that period of time, two to three weeks?

A. No, sir, I would say that the patient should be in the hospital if nothing else is planned, maybe [L-21] another two or three days.

Then we set up a plan of rehabilitation with the Physical Therapy Department and after two weeks a judgment will be made, but again the chances of these things happening from removing the bullet are very, very small.

Q. Thank you, Doctor?

THE COURT: All right, the circle where -- that you indicated was the left arm shoulder area indicated where the bullet is now?

A. Yes, sir.

• • • • • • •

BY MR. GOODMAN:

Q. Doctor Mendez, when you say it could cause an injury to the nerve, what injury -- what would result from that?

A. You mean from the removal of the bullet?

Q. Yes.

A. Well, several -- that section of [L-22] the nerves to the arm carries several branches for different muscle groups.

It's very hard to tell exactly what will happen but when we talk about damage we talk about what is called neuropraxia.

which is if in the process of doing surgery you pull on the nerve [illegible] reach what is behind it, sometimes you'll get a partial paralysis of some muscle group. let's say the extensor of the hand for two to three months.

BY MR. GOODMAN:

Q. For just two to three months?

A. Sometimes two to three months, maybe six months, it's hard to tell.

Q. Would it be permanent?

A. Unless you cut the nerve, no.

Q. Would you have to cut the nerve sometime in order to remove the bullet?

A. No.

Q. So, you're saying removing the bullet would just damage the nerves --

A. No, it may, that is the danger you run into, it may damage the nerves or it may do absolutely nothing.

A. But the damage it would do would

not be permanent, it would just be a temporary loss of the use of [L-23] that muscle group?

A. The most unusual circumstance would be to cut the nerves and I would say that is very, very unlikely.

Q. All right, thank you.

BY THE COURT:

Q. Let me ask you this, Doctor, how long would such surgery last in term of minutes, hours?

A. Forty-five minutes.

Q. Forty-five minutes?

A. Yes, sir.

Q. And was there any other wound or injury to the man when he was brought in?

A. No, sir, he did not receive any other wounds.

Q. And the x-ray clearly showed that this bullet and you have no doubt of its being a bullet and not some other

substance?

A. I don't think it's something -- it's anything else, no, sir, I think it's fairly clear.

The bullet -- it looks to me that it may have hit a little bit of the collar-bone and the nose of the bullet may have bended a little bit but it still maintains its cylindrical shape and it's hard to believe it will be [L-24] anything else.

Q. All right, and you expect to determine within -- well, within two or three days you would put him on a physical therapy

A. Uh huh.

Q. schedule, discharge him and check on his -- check about two weeks and then decide whether to remove -- make a final decision as to whether medically to remove the bullet?

A. Your Honor, unfortunately it can-

not be a final decision and I'm saying two

Q. Well, I mean --

A. two weeks because I would suspect that that type of injury, if he hasn't damaged anything else, if it's far away from the nerves that patient is usually -- when they receive a muscle injury in two weeks they can resume their normal activities without difficulty, that is why I'm saying two wekks.

Some patients respond different, so it may be that in three days or in four days due to intense pain or due to other reasons we may have to make that decision or maybe four weeks, two weeks I give it to you as a fair estimate.

BY THE COURT:

Q. What would be the -- if the Court [L-25] made a decision as to compelling the production of the evidence or authorized surgery, medically would it be

significant as to whether it were a couple of days or a couple of weeks that you can see?

A. No, as far as the difficulty with the surgery of the --

Q. The difficulty,

A. the result on the patient --

Q. the problems?

A. No, sir, Your Honor, I don't think there would be much difference.

• • • • • • •

[L-45]

Hearing on August 11th, 1982, before the Honorable James M. Lumpkin, Judge.

PRESENT: Aubrey M. Davis, Jr., Esq., Attorney for the Commonwealth

Joseph R. Winston, Esq., Attorney for the defendant

Rudolph Lee, Junior, the defendant, in person and by counsel

• • • • • • •

[L-52]

CECIL A. MOOREHEAD

• • • • • • •

DIRECT EXAMINATION

BY MR. DAVIS:

• • • • • • •

A. Cecil Allen Moorehead, forensic scientist in the field of Arms Identification.

THE COURT: Is there a stipulation as to qualifications?

MR. WINSTON: Yes, Your Honor.

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BY MR. DAVIS:

Q. Mr. Moorehead, the Court has before it

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a motion by the Commonwealth to remove a bullet in the shoulder area of the defendant in this case.

• • • • • • • •

[L-53]

Q. Do you have an opinion as to what may affect -- the length of time in the body, what effect it might have on the bullet itself if it's left in there too much longer?

A. I do. A bullet that remains in a body is affected by body chemicals and any medication that the individual may be on.

Of course, the longer the bullet

remains in the body the greater the amount of damage to the bullet is and it gets to a point where it would be impossible to identify the bullet both to a firearm or possibly to the caliber depending on the the length of time.

Q. Do you have any opinion as to how you can determine any particular length of time or does it -- excuse me, is it different -- I'm trying to get the question out, Judge, I think I'm talking too fast, depend on the individual involved as far as the chemicals are concerned -- body chemicals are concerned?

A. Possibly, yes.

• • • • • • • •

[L-54]

CROSS EXAMINATION

BY MR. WINSTON:

Q. Would the composition, Mr. Moorehead, of the bullet have any effect

on the rapidity of any deterioration that might take place?

A. Possibly, a lead -- a complete lead bullet will deteriorate faster than a semi-jacketed or jacketed bullet, yes.

Q. When you say jacketed, you're referring to a steel jacket or some substance -- metallic substance harder than lead?

A. Correct, yes.

Q. And do you have any idea in this particular case -- we don't know in this particular case whether or not -- do you know whether or not the bullet in this case is a jacketed bullet or a lead bullet?

A. No, of my own knowledge, I do not, no.

Q. All right, and could you -- is there any way you can say what effect a continuance of a certain period of time

would have -- I say continuance, I -- delay in excising a bullet from a body?

A. Well, of course, the longer the bullet stays in the body the more possibility it is to deteriorate.

[L-55]

This -- I can't say that it's going to deteriorate more in the next hour than it is in the next day but it's going to be deteriorating all this period of time, yes.

Q. Do you have any idea whether the bullet that the x-rays have shown to be in Mr. Lee's shoulder is identifiable at all through ballistics testing?

A. This would not be possible to determine from an x-ray whether it had individual characteristics on it at the present time, no.

Q. Can you say that a continuance of one, two or three weeks would have --

would take a -- would have the effect on a specimen that would otherwise be identifiable -- would have the effect of making it unidentifiable?

A. That's quite possible yes, it would, I mean every day that it is there chemicals are working on it.

Of course, you have a reaction and --

Q. Are you testifying that it would make it unidentifiable?

A. No, it would have -- I can't say unidentifiable but it would have a reaction on it, yes.

Q. All right, I guess the upshot is without knowing the substance of the bullet and without knowing what medication the defendant is currently taking, you just can't [L-56] form an opinion, is that correct, you just don't have enough --

A. Well, I'm not sure I --

Q. enough facts before you to form an opinion?

A. I still couldn't form an opinion as to the amount of time. The only opinion that I could state would be that the longer it is in, of course, it's -- the possibility of it deteriorating is greater, yes.

• • • • • • •

BY THE COURT:

Q. Mr. Moorehead, have you been furnished any information as to what perhaps the Commonwealth's theory of the case is as to the kind of bullet?

A. I discussed the case briefly with the investigating officer, Detective Dalton, and he stated that the evidence that they have at the present time is a .32 caliber.

The cartridges -- revolver, the cartridges which they have are also .32

caliber and Mr. Dalton -- Detective Dalton relayed to me that they are plain lead bullets.

The first question that entered my [L-57] mind at that point was when he said .32 caliber it could be either full metal jacketed or plain lead. However, when he said .32 caliber revolver that pretty much limits it to a plain lead bullet.

Q. Anything about the properties of such that would be -- that would affect your opinion substantially one way or the other as to the effect on -- by body chemicals or medication on this particular type of bullet?

A. Well, a lead type bullet has a tendency to deteriorate much quicker than a jacketed bullet.

That is, it will oxidize -- the first stage, of course, is oxidation and once a

bullet starts oxidizing the oxidation tends to remove the individual characteristics on the bullet which are the means of identification.

Q. All right, but as I have listened to you , you really can't pin down any time element, can you?

A. No, Your Honor, that wouldn't be possible.

Q. Are you aware of any medication the defendant may be on?

A. No, Your Honor, I'm not.

Q. You have no information as to that?

A. None.

* * * * * * *

[L-61] Hearing on August 25, 1982, before the Honorable James M. Lumpkin, Judge.

PRESENT: Aubrey M. Davis, Jr., Esq., Attorney for the Commonwealth

Joseph R. Winston, Esq., Attorney for the defendant

Rudolph Lee, Junior, the defendant, in person and by counsel

* * * * * * *

[L-63] C. MENDEZ-PICON

* * * * * * *

A. Doctor C. Mendez-Picon. I'm an M.D., I'm Associate Professor of Surgery at the Medical College of Virginia.

* * * * * * *

MR. WINSTON: Your Honor, I would stipulate to the Doctor's qualifications as an [L-64] expert.

* * * * * * *

BY MR. DAVIS:

Q. Doctor, since you were last before

the Court testifying on the 22nd day of July, have you had an opportunity to examine the defendant, Rudolph Lee, Junior?

A. Yes, I have.

Q. And in that regard, what were your findings in relationship to the bullet and its position at this time?

A. I saw him in the clinic on August 5th and at that time several facts were obvious.

Mr. Lee was doing well, he had no deficit motion of the shoulder although motion of the shoulder was painful. On physical examination the bullet hole in the superior part of the left chest was swollen and a hard mass was just below the collar bone approximately half a centimeter below the skin.

I felt that that was most probably the bullet and that previous examinations

have failed to show that that was the bullet because of the amount of swelling secondary to the bullet wound.

Q. An what is your opinion, Doctor [L-65] as to the -- if the bullet is now lodged, I believe you said, directly under the skin.

A. Yes, sir.

Q. as to what type of sugery it would require and what

* * * * * * *

danger it would be for the patient at this stage.

A. The type of surgery required would be local anesthesia which means infiltration of the skin by a local anesthetic and the removal of the bullet through an incision which may be maybe a centimeter and a half or about half an inch.

Q. Would this in your opinion --

medical opinion be minor surgery or major surgery?

A. Minor surgery.

* * * * * * *

CROSS EXAMINATION

BY MR. WINSTON:

* * * * * * *

[L-66]

Q. You said in response to Mr. Davis' question that the hard mass in the shoulder was most probably, I believe your words were the bullet?

* * * * * * *

Q. Can you tell whether or not it is the bullet?

A. No, unless I obtain an x-ray.

* * * * * * *

If I may add, Your Honor, an x-ray was not obtained because it was not medically indicated.

* * * * * * *

Q. What do you mean by that?

A. An x-ray is usually done when the x-ray will help in diagnosis or management.

Because of the pain that Mr. Lee was having was related most likely to just the fact that he had been shot in that area and there was no deficit motion, nothing could be improved and we elected to follow him -- to see him again in two or three weeks.

Q. Is -- does that mean that there's no medical - there still remains no medical reason to remove the bullet?

A. Exactly, as far as August the 5th [L-67]

• • • • • • • •

examination.

THE COURT: As far as what?

A. August 5th, that's the last time I saw Mr. Lee, it may be that now if I

see him I change my mind.

BY MR. WINSTON:

Q. Have you -- do you have an appointment to see him again?

A. He should be coming to the clinic most probably tomorrow or Thursday.

Q. Now, you said in response to Mr. Davis' question that you would characterize this as minor surgery?

A. Uh huh.

Q. Now, that's as compared to other types of surgery, is it not?

A. (No audible response is heard)

Q. I mean that -- I mean Mr. Davis' question comprehended only surgical treatments -- surgical procedures and not any other form of treatment?

A. Correct.

Q. How is surgery characterized in the range of treatments that the medical profession can provide to [L-68] injured

persons, is that considered a radical treatment or a conservative treatment?

A. Well, you're using words that are unfortunately very hard to explain what conservative is and what radical is.

I would characterize treatment as far as two ways, number one, whether it offers any relief and number two, whether it offers any help to the patient. As far as relief, it could be that removal of the bullet will take away some of the pain but that is totally speculative.

Number two, whether it presents any danger to the patient, taking an aspirin presents danger. Aspirin produces ulcers, at the same time minor surgery of the type that I have described will produce no danger on the basis that there's no general anesthesia employed.

Number two, the incision is not very big, it's about half an inch, number

three, that there's no fractures around the bullet which are of any importance that cannot be dealt with very easily. In other words, the chances of permanent or temporary injury by removing that bullet almost zero.

Your Honor, in my previous statement I have quoted a number of percentages ranging from zero point one percent to five percent and that was due to the fact that [L-69] we thought by the x-rays that the bullet was back inside close to the nerves and arteries.

Our examination now reveals that the bullet is far from the nerves and arteries, so the chances of injuring other structures are almost zero.

BY MR. WINSTON:

Q. But your feeling now that the bullet is far from the nerves and arteries is subject to a confirmation by

radiological testing, is that correct?

A. Correct.

Q. And is it -- it's still your opinion that it would be more dangerous to Mr. Lee to remove the bullet than to leave it in place?

A. The chances of hurting by taking the bullet are very small, it's very hard to put a percent on that but I would say that it's one to ten thousand maybe.

The danger of leaving the bullet if it doesn't produce any pain or any other problem most likely will be zero, so obviously to take it out would produce some degree of danger, whether it can be measured or stated in percentages is very difficult to say.

* * * * * * * *

[L-70]

Q. All right, let me ask you this, you said that you would -- for medical

reasons the only anesthetic that would be necessary would be --

A. Local anesthesia.

Q. But is it possible that you would have to use a general anesthesia in order to restrain a person?

A. Oh, I think that it's highly unusual, I have never seen it -- I have never come across it in ten years of practice and that's --

Q. Have you ever done any involuntary surgery or surgery that the patient did not want?

A. I think that all surgery is involuntary, I don't think anybody --

(laughter)

Q. I would agree with you in that regard?

A. Well, the point is that -- if I understand correctly, is whether if you start something under local anesthesia,

if the pain -- the patient moves let's say a child -- a ten year old child who obviously doesn't want to be [L-71] there, the chances are that under local anesthesia with a slight restraint things are taken care of very easily.

BY MR. WINSTON:

Q. All right, and it's still your medical opinion that it would be more dangerous to Mr. Lee to remove the bullet than to leave it where it is after -- based on your clinical examination of August the 5th?

A. Yes, sir.

* * * * * * * *

BY THE COURT:

Q. Let me be sure I understand, Doctor, you gave certain percentages when you testified previously.

A. Yes, sir.

Q. as to life threatening, I believe

your figure was less than one tenth of one percent?

A. Yes, sir.

Q. Would your figure be different today?

A. Yes, sir.

Q. If it can be so expressed, how would you express it again?

[L-72]

A. I think that is the tough part because before we had some structures that we may have to go through which means the nerves and the arteries to the extremities because that is what the x-rays show.

Today, the bullet is so superficial that the nerves and arteries are going to be far away from that and the chances of endangering the life are -- I guess it has happened sometimes that somebody will have lost his life through this type of surgery, but it's so unheard of and

there's so many of these surgeries performed that to put a number is very hard. If you want to put a number, one to a hundred thousand, one to ten thousand, very small percentages.

BY THE COURT:

Q. And as to -- you gave a figure, was it three to four percent of neural damage?

A. Yes, that was also related to our previous assessment.

I think that our present assessment on physical exam will show that the chances of having any permanent damage or temporary damage to any structure will be almost in the same category of the previous figure, one to a hundred thousand and the reason, Your Honor, I explain again is that the bullet seems to be just beneath the skin.

[L-73]

BY THE COURT:

Q. All right, the other figure that you had given was -- was it one percent as to the possibility of permanent injury?

A. Uh huh.

Q. What would be the --

A. That is also reduced to the previous figure, one to a hundred thousand.

Q. All right?

A. Your Honor, there's very little statistics that anybody has compiled about this type of injury, I'm guessing on the fact of the number of minor surgery procedures done and the number of times that I recall any problem develop.

Q. I take it all of this is with regard to consideration of the defendant's medical history?

A. Yes, Your Honor.

Q. As included in your examination?

A. Yes, Your Honor.

Q. And you, yourself, would perform surgery?

A. I will -- it's such an unusual case I will have to counsel with the State Attorneys.

I'm not a State employee in that [L-74] sense, I'm an emloyee of the Medical College of Virginia which is a State institution. I don't know the legal ramifications of this and I would have to check to see what my obligations and my duties are.

* * * * * * * *

VIRGINIA:

In the Circuit Court of the City of Richmond, Division I,

THE 25th DAY OF August 19 82

COMMONWEALTH

v.

RUDOLPH LEE, JR.

This matter began on July 21, 1982, at which time the Commonwealth presented to the Court [a] motion to compel evidence: removal of a bullet from the defendant for the purpose of ballistics examination; defendant's court appointed attorney was present and the Commonwealth was represented by Aubrey M. Davis, Jr. Hearings were held on July 22, August 2 and August 11 and defendant was present, as was his attorney and the Attorney for the Commonwealth; evidence and arguments of counsel were presented; said motion was taken under

advisement; bond was raised to $30,000.00; the defendant having retained Joseph Winston, Esquire, defense counsel was ordered to file memorandum of law in opposition to [the] Commonwealth's motion.

This day appeared the defendant, his counsel and the Attorney for the Commonwealth. Additional evidence and arguments of counsel having been presented on Commonwealth's motion previously filed and having maturely considered memoranda of law, the Court finds that the Commonwealth has presented probable cause in support of the motion, and having further found that constitutional rights of the defendant would not be abridged by removal, and that the elements of relevance and necessity were not refuted:

It is Ordered that Dr. G. Mendez-Picon or another skilled surgeon remove from the defendant the foreign matter disclosed by the evidence to be a .32 caliber slug, which

is located just below his collarbone, that such removal be done at the Medical College of Virginia Hospital with accepted medical procedures, with due regard given to the health and preservation of life of the defendant, that if at any time during the course of the removal procedures danger to the life of the defendant develops, such removal procedures shall cease and such other steps as may be necessary shall be taken to protect the health and life of the defendant; and that after removal of the foreign matter, such matter shall be turned over to an authorized representative of the Richmond Bureau of Police for ballistics tests and preservation as evidence.

It is further ordered that the said defendant shall not tamper with or disturb the aforesaid wound, or remove, destroy or dispose of the bullet lodged therein.

The defendant by counsel moved the

Court for reduction in bond and evidence and arguments having been presented thereon, the Court denied said motion, leave being granted defendant to renew.

On motion of defense counsel, this order is stayed until September 1, 1982, to be extended until September 28, 1982, upon the filing of a petition for a writ of prohibition by the defense to the Supreme Court of Virginia.

Thereupon the said defendant is remanded to jail.

August 25, 1982 A COPY,

TESTE:

BY /s/ (illegible) D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

RUDOLPH LEE, JR.,

Petitioner,

v. CIVIL ACTION NO. _____

ANDREW J. WINSTON, Sheriff,
City of Richmond
1701 Fairfield Avenue
Richmond, VA 23223

GERALD L. BALILES,
Virginia Attorney General
101 N. 8th Street
Richmond, VA 23219

AUBREY M. DAVIS, JR.,
Richmond Commonwealth's Attorney
800 E. Marshall Street
Richmond, VA 23219

and

CIRCUIT COURT OF THE CITY OF RICHMOND,
VIRGINIA, DIVISION I
Serve: Ronald E. Belton, Chief Deputy Clerk
800 E Marshall Street
Richmond, VA 23219,

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS
AND APPLICATION FOR
TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUCTION, AND
PERMANENT INJUCTION

Comes now petitioner, Rudolph Lee, Jr., in proper person and by counsel, and prays that this Honorable Court issue a Writ of Habeas Corpus, a temporary restraining order, and preliminary and permanent injuctions, and states as his grounds:

1. This action arises under 18 U.S.C. § 2254 and 42 U.S.C. § 1983.

2. That petitioner is held in the Richmond City Jail awaiting trial in lieu of a $30,000.00 bond on indictments charging attempted robbery [Va. Code § 18.2-26 & 58 (1982 Repl. Vol.)], malicious wounding [Va. Code § 18.2-51 (1982 Repl. Vol.)], and two "use of firearm" charges [Va. Code 18.2-53.1 (1982 Repl. Vol.)], which were returned by the Grand Jury of the Circuit Court of the City of Richmond,

Division I, on September 7, 1982 (Case No. F-82-1417 to 1420).

3. That on July 21, 1982, Aubrey M. Davis, Jr., Attorney for the Commonwealth for the City of Richmond, filed a Motion to Compel Evidence in the Circuit Court of the City of Richmond, Division I, seeking to recover a bullet lodged in the petitioners's left chest.

4. That an evidentiary hearing was held on the Motion to Compel Evidence on July 22, 1982, where it was shown through hearsay evidence that petitioner had been identified by the victim of the alleged crimes described in paragraph two as the assailant whom he had shot during the incident.

5. That at the July 22, 1982 evidentiary hearing, and another evidentiary hearing held on August 25, 1982, the petitioner's attending physician, testifying

on behalf of the Commonwealth, related that there was no medical reason for removal of the bullet, in that risks of removal were greater than the risks of leaving the bullet lodged in petitioner's left chest area under his collarbone.

6. That at a hearing held on August 2, 1982, the Attorney for the Commonwealth moved to increase the defendant's bond from $10,000.00 to $50,000.00, stating as the sole ground the need to preserve the evidence. The Circuit Court raised the bond to $30,000.00 and declined to reverse itself at the hearing of August 25, 1982.

7. That the Circuit Court of the City of Richmond, Division I, The Honorable James M. Lumpkin, Judge presiding, sustained the Commonwealth's Motion to Compel Evidence on August 25, 1982 but stayed its order until September 28, 1982.

8. That the Order sustaining the said

Motion to Compel Evidence and refusing to reduce the bond to $10,000.00 deprives petitioner of rights, privileges and immunities securied by the Fourth and Fourteenth Amendments to the United States Constitution, namely that it violates the integrity of the human body, does not constitute a minor intrusion into an individual's body under stringently limited conditions, and is not necessary in the circumstances.

9. That the aforesaid action of the Circuit Court of the City of Richmond, Division I, is to the manifest prejudice, damage and grievance of your petitioner, and the execution of the aforesaid Order would cause petitioner irreparable harm.

10. That the aforesaid action of the Circuit Court of the City of Richmond, Division I, will require custody in addition to the detention imposed by the original

$10,000.00 bond in that agents of the respondent Sheriff will be required to take the petitioner to a designated hospital and to restrain him during the contemplated surgery, and in that the bond of the petitioner has been raised by the Circuit Court.

11. That the custody complained of in the next proceeding paragraph is in violation of the United States Constitution.

12. That the conduct complained of and sought to be restained and enjoined was and will be engaged in under color of State Law.

13. That on August 31, 1982 petitioner presented to the Supreme Court of Virginia a Petition for Writ of Habeas Corpus and/ or Porhibition (sic) seeking review of the order of the trial court.

14. That on September 1, 1982 petitioner presented to the Supreme Court of Virginia a Petition for Appeal seeking review of the

order of the trial court.

15. That on October 13, 1982, the Supreme Court of Virginia denied the prayers for relief in the aforesaid petitions, and petitioner has no other remedies under State law.

WHEREFORE, petitioner, Rudolph Lee, Jr., in proper person and by counsel, prays that this Honorable Court issue a Writ of Habeas Corpus forthwith freeing the petitioner from the custody imposed by the order of the Circuit Court of the City of Richmond, Division I, dated August 25, 1982; that the respondents be temporarily restrained and both preliminarily and permanently enjoined from any and all efforts to enforce the aforesaid order; that counsel be appointed for petitioner upon the Petition for Writ of Habeas Corpus; and that upon the complaint to enjoin any further violation of his civil rights, he be awarded his costs,

including but not limited to, reasonable counsel fees.

I, Rudolph Lee, Jr., declare under penalty of perjury that the foregoing is true and correct.

Executed on October 13, 1982.

/s/ Rudolph Lee Jr.
RUDOLPH LEE, JR.
In proper person

/s/ Jos. R. Winston
Joseph Ryland Winston
Counsel for Petitioner
HOUSE, LUBMAN & DAVIDSON
P. O. Box K-200
Richmond, VA 23288

IN THE UNITED STATES

DISTRICT COURT

FOR THE

EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

RUDOLPH LEE, JR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action
	)	No. 82-0672-R
ANDREW J. WINSTON, et al.,	)	
	)	
Respondents	)	

The Order and Memorandum Opinion dated October 15, 1982, can be found in the Supplemental Appendix to the Petition for Certiorari

V I R I G I N I A:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I

COMMONWEALTH OF VIRGINIA
F-82-1417
vs. F-82-1418
F-82-1419
RUDOLPH LEE, JR. F-82-1420

Transcript of the Motion in the above-styled matter when heard on 21st day of October 1982, before the Honorable Thomas N. Nance, Judge.

• • • • • • • •

[N-3]THE CLERK: Commonwealth vs. Rudolph Lee Jr.

THE COURT: Mr. Winston, you filed a motion for a rehearing on a change of circumstances?

Mr. Winston: Yes, sir.

THE COURT: All right, are you ready to go forward with your motion?

MR. WINSTON: Well, Your Honor, it is my understanding that it was set today because we previously had this time set aside for this case for its merits of the trial, originally, and then a motion, a discovery motion.

I indicated to the Court when we set this matter two days ago for this morning--when I say this matter, I mean the motion to rehear this -- that I would do my very best to be ready by today. Well, I have found that there is just no way in the world I could be ready to go forward on a motion. There are three doctors involved. I have talked to two of them. One is a surgeon and an anesthesiologist. I never talked to that person. I have talked to the other surgeon over the telephone. MCV, to say the least, does not move quickly. I was down there all yesterday morning. It took me two hours just to look at the medical

records. This is an extremely [N-4] complex issue to me. At this point in time I have consulted on the telephone with an independent expert in the field of anesthesiology.

It was my understanding that Dr. C. Paul Boyan of the Anesthesiology Department at MCV did, on the 19th, the day before yesterday, at the request of Drs. Mendez-Picon and Whitley, an anesthesia consult.

Now, at that time he made a determination that a local anesthesia was necessary, but in subsequently interviewing Dr. Boyan, I discovered that at that time he had not seen the X-rays, which are the basis of the -- whole basis of this motion to comple, that the X-rays have showed a change in circumstances. In other words, in the orginial hearing herein Dr. Mendez-Picon testified that his clinical findings were that the bullet was located just below

the skin. Dr. Boyan did exactly the same thing. He went in; he did a clinical examination; said the bullet was located just below the skin; we can do a local anesthetic in this case, but he was not provided with the X-rays. Now he had seen one of the 10 or 12 exposures that were done; he's seen them this morning. But with the case [N-5] in that posture, I just find it impossible to consult with an expert and be able to talk rationally. I can't tell -- I still have -- I have talked with Dr. Boyan again this morning; I still have no -- I couldn't -- there are just hundreds of aneshtesia -- general, local; that is just the first step. I mean, after that, there are just hundreds of compounds that can be used in various combinations and strengths, et cetera. I have spent the better part of yesterday and last night reading an introduction to anesthesia so I can try to figure

out if I can ask a question regarding anesthesia with any intelligence, and I am not sure I can this morning.

My problem, then, is not with examining either Dr. Mendez-Picon or Dr. Whitley, who if the Court is not already aware, is -- he's under subpoena to be here at ten, but he's had previously booked surgery, and I understand will be in the operating room until at least two o'clock this afternoon; though I have no problem with examining either one of the surgeons today; we have got one of them here; but as far as the anesthesiologist is concerned, I just fell that I am totally unprepared.

[N-6]THE COURT: Well, we are going to hear it this morning. We are going to hear from the doctors that are here; and of course I am interested in just a couple of things: I am interested in one, whether or not the situtation, as it is, is going to be of any

more danger to Mr. Lee than was previously heard. That means in the sense of the movement or the current placement of the item or object, or whatever it is. Also, the use of a general or a local anesthetic. I want to know if that is going to create any more danger to this man, and that is really all I am interested in.

MR. WINSTON: That is all I am interested in, too, Your Honor, but that is an extremely complex -- those are extremely complex questions, and there may, in fact, be a divergence of medical opinion. That is why I am addressing my inability to get an independent expert on such short notice.

THE COURT: Either you call the doctor or I am going to call him. We are going into this. If you have any questions or the Court has any questions at the conclusion of this hearing, then we'll take a different course; but we are going into it this

morning.

[N-7]MR. WINSTON: In that event, I would call G. Mendez-Picon.

Your Honor, I think that the record will reflect that Dr. Mendez-Picon was previously qualified as an expert on behalf of the Commonwealth --

MR. GARRETT: I have no problem at all.

MR. WINSTON: -- and was stipulated to.

THE COURT: All right.

DR. G. MENDEZ-PICON

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DIRECT EXAMINATION

BY MR. WINSTON:

Q. Doctor, have you had occasion to examine Mr. Lee recently since your last testimony in this court?

A. Yes, I have.

Q. Did you again review the history and perform a clinical examination?

A. Yes, I have.

Q. Could you tell me very briefly what the history and clinical examination revealed.

A. Mr. Lee was admitted to the emergency room at the Medical College after suffering a gunshot wound [N-8] to the left shoulder, and subsequently, after two or three days in the hospital, he was discharged when no injury was present to his blood vessels or nerves to the arm. He was seen by me in the clinic a couple of other times. The

first time when he was admitted to the emergency room and while he was in the hospital, the swelling in the area didn't permit a very good clinical examination as far as the area in question. When I saw him in the clinic about 10 days later, the swelling had dimished and I felt a hard mass underneath the skin. After a week later I communicated with the Commonwealth's Attorney's office, sent him a letter, because after consulting with counsel at MCV I felt it was my responsibility in a criminal case to provide the Court with more information; and in that letter, which I have a copy here, I stated that the bullet was now, upon my examination, underneath the skin; that this change in clinical impression is due probably to the disappearance of the swelling in the area in question and the ability to perform a better examination; second, that this was on a clinical impression based on physical examination and not confirmed by

X-rays; third, X-rays were not obtained because they were not medically indicated; fourth, at the present time there is no physical indication for removal of the bullet; and five, I have explained all these facts to [N-9] the patient. After this, the patient was brought under a court order to the Medical College, and prior to proceeding to remove the bullet by Dr. Whitley, I had arranged for the patient to have some X-rays to determine whether that mass I was feeling was indeed a bullet or scar tissue; and the X-rays showed that the bullet was not in that area but it was about an inch deeper into the muscle.

Q. Let me interrupt you for just a second. The testimony that you gave in the previous hearing was in terms, I believe, of centimeters. For uniformity's sake, if you could, continue to use the metric system.

A. The bullet was located on X-ray and

by calculation a measurement of about three centimeters, two and a half to three centimeters deep into the muscle substance. On the basis of that, the patient -- it was a decision by Dr. Whitley, which I concurred, that it would be safer to remove the bullet under general anesthesia and the local excision of the wound was not carried out.

The patient was admitted to the hospital at that date in order to undergo test to determine his risks under general anesthesia, and at that time I examined him again. The patient has no nerve local deficit and he has no vascular deficit. He moves his [N-10] arm perfectly well and he has full range of motion in that shoulder. The patient complained to me of no pain. In physical examination I concluded the patient has a scar approximately half a centimeter underneath the collarbone on the left side, which is the place where the bullet had

entered, or object had entered, and at the present time his physical examination is normal to the best of my ability.

Q. You testified that you ordered radiological testing. Did you order any other kind of testing?

A. Under the court order, I was told in the emergency room by the law enforcement agency that the court order covered general anethesia, after the law enforcement agency had consulted the attorney, Commonwealth's Attorney, so in order to get the man ready for general anesthesia, the standard pre-operative tests were ordered, blood test, electrocardiogram, EKG, and a chest X-ray. I was told the next day in the morning that Mr. Lee had refused blood testing, and at that time I was told that the court order didn't cover general anesthesia. On that basis, I had no power or no need to obtain those tests, so I discharged the patient.

Q. Let me go back. You said that you ordered blood tests. Did you say you ordered a urinalysis?

A. I didn't say it, but we did; I'm sorry, [N-11] yes, sir.

Q. Do you have them over there?

A. Yes, sir.

Q. Were the other tests other than the blood test performed?

A. Not to my knowledge. The blood test -- the patient refused the blood test.

THE COURT: But the other tests were performed?

DR. MENDEZ-PICON: The chest X-ray was performed; the EKG was not performed. The patient refused everything but an X-ray. I was told that by the health nurse on the ward.

BY MR. WINSTON: (Continuing)

Q. Maybe I am assuming too much here, but if you can take someone who is not

consenting to an operation, a surgical procedure, whether it be under general or local anesthetic, you can do that over his objection; can't you take a blood test over his objection?

A. I can't do anything over any patient's objection. That is number one, so I have to relate everything of what the court order says.

Q. I'm not speaking in the first person; I am saying it is not possible for that to be done?

A. It depends on what the intention of the [N-12] court order is, so the first thing we did when the patient refused was to come to the administration of the hospital, which they contacted the legal counsel at MCV, which presents the opinion that the Court felt, the explanation of the court order, that it didn't cover general anethesia. If it didn't cover general anesthesia, it didn't cover anything relating to general

anesthesia. If the patient -- if I may explain that, Your Honor -- if the patient is going to have local anesthesia, that doesn't require any blood tests to assess the stability of the patient. On the other hand, any patient who is going under general anesthesia will require, by hospital, by law, and by anesthesia determination a minimum of tests, which include a chest X-ray, EKG, blood test, and urinalysis, which the patient will not be put to sleep under any circumstances.

THE COURT: You are saying that none of these have been done except the X-rays?

DR. MENDEZ-PICON: Yes, sir, that's correct.

BY MR. WINSTON: (Continuing)

Q. Based on your most recent clinical examination and based on the tests that were done, it is still your opinion that the

excision of this bullet is not medically indicated?

A. That is correct.

Q. That it still remains more of a danger to Mr. Lee to take that bullet than it is to leave it where it is?

A. That is my feeling.

Q. You said before that X-rays were not indicated, and is it correct that they were not indicated because the surgical procedure was not indicated?

A. Correct.

Q. Let me get you to describe in detail what exactly you would have to do if you were going to perform this operation, what exactly you would have to do to excise this bullet; in other words, from the first needle you would stick into the defendant on through.

A. Well, what would be needed would be an incision of approximately five centimeters.

The incision would be carried out through the skin, fat, and the fascia, which is the layer which covers the muscle; then the muscle fibers have to be spread.

Q. Let me interrupt you for just a moment. Which muscle?

A. The deltoid muscle, which is the shoulder muscle. The muscle fiber will have to be spread by the use of protractors, and the bullet has to be localized -- usually bullets have a small amount of scar tissue around them, which the body isolates them with; that scar tissue is excised; the [N-14] bullet is removed. Following that, bleeding is controlled, if any exists; the muscle fibers are left back in place, and the layers that were cut are sutured together.

Q. How long do you think that this whole procedure would take, the one that you have just described?

A. I expect it could be done under half an hour.

Q. Under half an hour?

A. Yes, sir.

Q. In the ordinary course of your profession, is it generally the function of the surgeon or the anesthesiologist to request either a general or a local anesthetic?

A. Well, I have to qualify that, and if I may, first of all, procedures done under local anesthesia, most of them are not done in the operating room unless there are any indications for it, so most of the time when the procdure is done under local anesthesia, the Anesthesia Department is not involved. They are done either in the private surgical office, in the treatment rooms, or in the emergency room.

If the patient is going to have any kind of general anesthesia, they are going

to have to be done in the operating room. So it is possible that the [N-15] anesthesiologists don't know which cases are done under local. The decision of whether to do local or general depends soley on the surgeon. Now, it the patient, for any reason, refuses general anesthesia because of fear, apprehension, previous bad experiences, then it is up to the surgeon to discuss with the patient the possibility of pain, discomfort, and difficulty you might find doing something under local anesthesia. If the patient still refuses general, then you do him under local. If, on the other hand, the patient doesn't want the amount of pain or discomfort, or possibility of having problems under local anesthesia, then they are consulted, and if they have any strong contraindication for general anesthesia, they express it. If not, we proceed with general anesthesia.

So the function of the anesthesiologist, as far as I understand it and I have been used to, is to provide the safest way to the patient, and ususally this will happen maybe in five percent of the cases, and it is usually so recommended for the patient not to have general anestheria because, under their opinion, general anesthesia will put the patient in a higher risk, and I am referring to previous heart attack, pulmonary conditiions, older age group, whatever.

Q. But it would be your opinion that with a general anesthetic the risk to the patient would be less [N-16] under a general anesthetic for the type of procedure that you have just described several minutes ago?

A. That was my opinion, yes, sir?

THE COURT: Restate the question.

Q. It is your opinion, is it not, that the risks to the patient are less through

the use of a general anesthetic in the type of procedure that you have described?

A. Yes, I think that to remove a bullet that depth, in the middle of the muscle, it would be safer and it would be accomplished with less complications if it is done under general anesthesia.

Q. Back to the location of this bullet, how far is this bullet from the pleural cavity?

A. I can't tell for sure, but I expect approximately five, six centimeters.

Q. Is it possible that it could be closer than that?

A. Possible, not likely.

Q. Does proximity to the pleural cavity present any additional dangers? In other words, let's suppose -- I know you have testified it is not, but lets suppose it were one centimeter from the pleural cavity.

A. That is the sort of problem that it

would make general anesthesia safer so it can be done cleaner.

[N-17]Q. Can you elaborate? Why would it be safer?

A. Well, it is safer because under general anesthesia the muscles are relaxed. If a patient is under local anesthesia, the amount of pain that he's going to be producing if it's deep into the muscle is considerable. The patient may tighten up, move, make exposure of the area where you are working more difficult, and makes the possibility of not recognizing any other important fragments, and extraction would be much more difficult.

Under general, on the other hand, muscles are relaxed, retraction and exposure of the area can be done very easily to the pleural cavity, which happens to be one or two centimeters from where you are working.

Under local anesthesia, the chances

of injury because it is not seen are greater than is done under general.

Q. What kind of injury could he suffer due to the proximity to the --

A. To the pleural cavity?

Q. Yes.

A. Puncture of the pleural cavity.

Q. Which would cause?

A. Pneumothorax.

Q. That is?

[N-18] A. Air into the pleural cavity and collapse of the lung.

Q. Is it correct to say that the bullet is now closer to the pleural cavity than it was previously thought on clinical findings?

A. Not really, no, because, as a matter of fact, it may be farther. You have to realize you are talking in a three-dimensional plane, and the bullet can be very close to the skin in front of the chest, and being one centimeter from the skin and two

centimeters from the pleural cavity -- the pleural cavity supports the nerves at the shoulder. So the bullet, now, we believe, we know is farther away, deeper, but by the same token higher.

Q. If the radiological findings had confirmed the clinical findings and the bullet were, had been located just a half a centimeter below the surface of the skin, it is my understanding that the procedure would have gone forward without consulting the Anesthesia Department?

A. Correct.

Q. If you had been performing that procedure, can you tell me what anesthetic you would use?

A. One percent Xylocaine.

Q. Trying to eliminate risks related to anesthesia, frequently from the surgical point of view, [N-19] how does the risk compare with the surgery that was contemplated

under the clinical findings with what is now contemplated under the radiological findings?

MR. GARRETT: Objection at this point. If he asked if there is a greater anesthetic risk than Dr. Mendez would know, that is not an appropriate question.

MR. WINSTON: I asked him to exclude radiological risks.

A. That is a difficult question to answer if you exclude radiology. As I said before, the risk of surgery at the present time, because the bullet is deeper, is a little bit greater than I have stated before when I based my opinion only on my clinical examination. The dangers are a little higher because the bullet is deeper, so the chances of infection are a little greater and the chances of nerve damage are a little bit greater, but nevertheless, even as the

surgeon, I think that general anesthesia carries a higher risk than local. If you ask me to put a number or a percentage, I don't think I can do that, because that has to be done by the Anesthesia Department, which is conducting this all the time.

THE COURT: Excluding that just --

DR. MENDEZ-PICON: If you exclude that from the surgical point of view, the surgeon [N-20] knows maybe the chance of injury, anything will double of what it was stated before, and I think it would be one into 100,000 chance of problems. I think that the chance of problems now may be one into 50,000 or one into 20,000, but again, Your Honor, this is just speculation, because this type of study is very difficult to do. We don't have so many cases of that we can say with certainty the chanses of injury are this. The

chances of injury, permanent or temporary injury, for removing the bullet, are still very low, in my opinion, very small.

THE COURT: You are talking about minor surgery?

DR. MENDEZ-PICON: We are talking about a five-centimeter incision and dissection into muscles; that a minor surgery.

THE COURT: Minimal bleeding?

DR. MENDEZ-PICON: Minimal bleeding.

THE COURT: Is there any possibility or any greater probability of any nerve damage?

DR. MENDEZ-PICON: Greater possibility because you are five centimeters deep, three centimeters deep, and that is where nerves are going to be located, but greater than before. [N-21] My impression of the bullet was that it was

underneath the skin, and there are major nerves running underneath the skin in that area, so the risks are greater, no question.

THE COURT: Doctor, my understanding of the location of this bullet, though, is it has not necessary changed from what it was originally; it is just the fact that you now know for certain where it is?

DR. MENDEZ-PICON: Correct. The bullet, most likely, didn't move. It is very difficut in the X-rays that we had in the emergency room the first time we saw him. Our concern when a patient comes in with a bullet in that location is injury to the nerves and injury to the arteries and injury to the pleural cavity. We excluded that, all three, by physical examination of the pleural cavity, by chest X-rays, and by blood

testing with an arteriogram. Once the thing is done, the chances of that bullet producing any problems are very, very small. So we exclude the major injury. The bullet, I don't think it changed; the trouble is that the shoulder region is not an easy region to make an X-ray of and pinpoint exactly. You need to [N-22] fluoroscope; in other words, being able to move the patient on an X-ray table and pinpoint where the bullet is by several X-rays and several planes. I never did that because nobody told me to do that, and it was not medically indicated. But I stated to the Court in my previous testimony several times that that was only a clinical impression, and I stated to the Commonwealth's Attorney in the letter that you have have, if you wish.

THE COURT: I am familiar with the prior testimony; I read it all.

Under the situation as it is now, and did I understand you to say that the use of a general would be better than a local in this situation?

DR. MENDEZ-PICON: Yes, sir.

THE COURT: Because the muscles relaxing make it easier now for whoever is removing the object?

DR. MENDEZ-PICON: Correct.

THE COURT: It would also make it more comfortable for the patient?

DR. MENDEZ-PICON: Yes, sir. As a matter of fact, if I may expand on that, most of the surgeries are done under general anesthesia [N-23] in our clinical practice for comfort to the patient; and in spite of the fact we know that general anesthesia carries a little higher risk than a local, even

if the patient is older, we believe the stress and pain is much, much less under general anesthesia.

THE COURT: I didn't mean to butt in gentlemen. Go ahead.

BY MR. WINSTON: (Continuing)

Q. You alluded several moments ago in the possibility of nerve damage. What nerves are in the area where the bullet is?

A. We believe that the relationship of the nerves there are posterior-anterior, the brachial plexus, which are the nerves to the arm.

Q. What would happen if one of those nerves was disturbed in some manner but not cut?

A. The patient may have some tingling sensation for a while and may have some numbness in some portions of the arm for a period of time, which can range from a week to a couple of months.

Q. In the event that a nerve were cut, what effect would that have?

A. Well, depending on what nerve is cut and depending -- you can have paralysis of certain muscles of the arm for any period of time until regeneration occurs, and that can go from four months to a year if a nerve is cut.

Q. The nerve will regenerate?

A. The nerve will regenerate. I may qualify that by saying that you have to put it back together after you cut it; the nerve will not jump, but if this is performed, a nerve will regenerate; and I may qualify that further, saying that no nerves regenerate at the same time, and it depends where you cut the nerves, but at this area it is possible to regenerate the nerves.

Q. In response to His Honor's questions, you stated that two of the functions of the general anesthesia in this case would be

comfort to the patient and an aid to the surgeon in immobilizing the area that you are going to perform a procedure on. Now, notwithstanding that, that is, general anesthesia, is it still necessitated because the radiological findings indicate this is a more dangerous procedure than the clinical findings indicated that it was going to be?

A. Correct.

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[N-25]CROSS-EXAMINATION

BY MR. GARRETT:

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Q. You examined Mr. Lee on how many occasions?

A. About five or six?

Q. What would you state is the status of his health at this time?

A. As near as I can determine, very good; a healthy, early 20-year-old man.

Q. Twenty-six years old?

A. Yes.

Q. Did he indicate to you he had any past problems necessarily that would affect the taking of the bullet?

A. Not that I remember.

Q. Did he indicate to you he had on previous occasions been placed under a general anesthetic?

A. I don't believe I asked him that question nor did he state so.

Q. I want to make sure the record is clear; is this considered minor surgery?

A. Minor surgery.

Q. Even if general anesthesia is recommended, that is still considered minor surgery?

[N-26]A. Minor surgery under general anesthesia, yes, sir.

Q. Most bullets that are taken located there, are they done with general anesthetic? In other words, is it a common practice in

the medical field to take them out?

A. Well let me -- we don't take that many bullets; most of the bullets remain unless it is in the process of repairing the damage that the bullet has caused.

Q. Is it unusual to use a general anesthetic?

A. No. I think that what I would like to say to you and to the Court is that the decision of the general anesthesia to Mr. Lee was based on the standard of practice that we have established and that we follow. In other words, sometimes in our surgery on any other person I would recommend general anesthesia.

Q. When the person is a young child or a healthy person?

A. Yes, sir.

Q. Would the degree of cooperation exhibited by the patient have any bearing on the decision to go to general as opposed

to local, all other things being equal?

A. I expect that subconsciously we have on occasions, but the fact that we are aware of the [N-27] possibility of that influence on our decision, I think we are aware and we careful of making that decision as far away as the legal implications of the case as possible and concentrate on the medical implications, and that is why Dr. Whitley made a decision on his own, and I agreed with him after he made it.

Q. But does that enter into the picture at all, the cooperation of the patient, whether Mr. Lee or anybody else?

A. Well, let me put it this way, if you have a mentally incompetent patient, or if you have a child, even in a young teenager I think that general anesthesia or some fear of the general sedation, whether it is total anesthesia or just intravenous, say like you have when you have a wisdom tooth

pulled, would be strongly indicated.

Q. Is it common to place people under general anesthetic for minor operations.

Q. Yes, quite common.

THE COURT: What was the question?

MR. GARRETT: Is it common or uncommon to place people under general anesthetic for what you consider to be minor surgery?

DR. MENDEZ-PICON: Well, it is very common today. The out-patient surgery department at MCV [N-28] performs 10 a day for different types of thing, and most of them are done under general anesthesia. The patient has general anesthesia at 10 o'clock in the morning; he's ready to go home at three o'clock in the afternoon.

Q. You said that your X-ray determination found that the bullet was -- I think you said -- between two and half and three centimeters

beneath the skin. How did you arrive at that determination?

A. We placed a marker on the skin; that marker is a lead piece; then we take several X-rays and then we measure the distance between the marker and the bullet. Now, every X-ray has a magnification, depending on how far the tube, the X-ray is from the patient. We measure the marker in the X-ray and before we place it in. We know the magnification of this. Then we measure the distance of the total magnification and we reduce 25 percent of the distance.

Q. Is that how you arrived at that?

A. Two and a half, three centimeters.

Q. That is determined, that is based on that procedure?

A. Yes, sir.

Q. Would the position that the bullet is in, if you were to remove it either by local or general [N-29] anesthetic, result

in any impairment to Mr. Lee of a permanent nature of the use of his shoulder or his arm or any area in that general area?

A. I don't believe so.

Q. Have you yourself taken out bullets in the past from people in this area of the shoulder?

A. I think on a couple of occasions.

Q. The point I'm trying to make, are you able to see these nerves that you are talking about when you operate.

A. Oh, yes.

Q. So it is not a question of judgment; you don't know where they are?

A. Oh, no. As a matter of fact, if the bullet is in the muscle, the visualization, ability to look at the structure, would be very good, because exposure is much better, and that is the point of the safety of general anesthesia. Traction into the muscle and exposure is very good; so anything that

doesn't have to be cut is not cut.

Q. Are the chances small or great that the nerve would be cut?

A. Very small.

Q. You talked about the bullet being five to six centimeters from the pleural cavity. What is the [N-30] pleural cavity?

A. The pleural cavity is the space around the lung, and there are two layers, and it is a cavity which is empty; it has fluid; it has negative pressure. That is what keeps the lung from collapsing. If any puncture is made and air gets in, sucks in, the lung would collapse.

Q. If Mr. Lee were a patient who walked in off the street and said, "I have got a bullet wound in my shoulder; I want you to take it out," would your findings and your recommendation be any different that they are today?

A. Well, the first question that I will

ask him is why you want to take it out.

Q. Assume that he wants to take it out.

A. If he has pain or difficulty or any kind of distress of psychological impairment because he has a bullet in his shoulder, and after a reasonable rest to be sure that he is not mentally deranged, I would take the bullet under general anesthesia.

Q. You don't know of any physical disability or condition that might be present in Mr. Lee that would indicate medically that the bullet shouldn't be take out?

A. I am not aware of any.

Q. Or that would prohibit or preclude surgery?

A. I am not aware of any.

[N-31]Q. This would be done in the hospital, in MCV, utilizing accepted medical practices and standards would it not?

A. Correct.

Q. Would you say this is a simple

operation or complicated one?

A. Simple.

Q. You say it would take under half an hour?

A. Yes.

Q. You mentioned something, that if the nerves were disturbed but not cut, just touched or tapped or whatever, you said there could be some tingling, numbness in his arm or shoulder for a while. Would that be permanent or just temporary in nature?

A. Most of the time it is temporary and the numbness most probably would be in the arm, not in the shoulder.

Q. Based on your expertise, having worked as a surgeon in the past, do you foresee any complications in removal of this bullet from Mr. Lee based on your observations of him at this time?

A. No, I don't see any.

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[N-32]REDIRECT EXAMINATION

BY MR. WINSTON:

Q. You remain the patient's attending physician, do you not?

A. Correct.

Q. Was it your testimony previously that in the majority of cases similar to this that the bullet is -- this would be gunshot wound cases, of course -- the bullet would be left in the patient?

A. Correct.

Q. The operation that you were contemplating on the basis of your clinical findings, how long would that procedure have taken?

A. Ten or fifteen minutes.

Q. There was a question that Mr. Garrett asked you: I didn't really understand. I think he asked you something about the risks of something happening to Mr.

Lee's shoulder. It is my understanding that you testified that there is a possibility that Mr. Lee could become paralyzed?

A. Oh, there is a possibility, sure.

Q. There is a possibility that he could die?

A. Certainly.

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[N-33]RECROSS-EXAMINATION

BY MR. GARRETT:

Q. What is the possibility of him dying from this operation, mathematically?

A. My understanding is that it would be one to 25,000, one to 30,000, but I think Dr. Boyan has better statistics.

THE COURT: You are basing your findings on the surgical procedure of dying as a result of a surgical procedure on the total?

DR. MENDEZ-PICON: Under general anesthesia the chances of dying from

that procedure itself, I have to say one in 100,000, on in 50,000, on in 25,000, very small.

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Q. What is the range of him being paralyzed are you able to say?

A. That is hard to say as far as total paralysis; the chances are maybe one into 1,000, one into 10,000, something like that, very small.

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[N-34]FURTHER REDIRECT EXAMINATION

BY MR. WINSTON:

Q. What do you base the statistics on that you have just quoted?

A. On operations performed on that area of the shoulder for other reasons like this location of the shoulder, trauma, and so forth and so on.

Q. Did you research any compilation of statistics?

A. I didn't do any research. Literture is quite available and being produced all the time, so again that is why I am not making a certain number or a certain time. I am saying that is what I would quote to any patient who would come; that is the best of my understanding, the chances are very small. You have to understand that one percent in medicine is a substantial risk, so anything that is less than a substantial risk would be less than that.

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[N-28] MR. WINSTON: I call Dr. Boyan, Your Honor, to shorten matter somewhat, if there will be a stipulation to the witness' qualifications.

MR. GARRETT: Most certainly. I would like to ask him what his current position is.

[N-39] DR. C. PAUL BOYAN

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DIRECT EXAMINATION

BY MR. WINSTON:

Q. State your names for the record, please.

A. Charles Paul Boyan.

Q. What is your profession?

A. I am a physician.

Q. Your specialty?

A. Anesthesiology.

Q. In what capacity are you presently employed?

A. At the present time I am professor emeritus at the Department of Anesthesiology.

Q. At the Medical College of Virginia?

A. At the Medical College of Virginia.

Q. Were you requested to do an anesthesia consult on Mr. Rudolph Lee?

A. Yes, sir.

Q. Who requested that you do that?

Q. I think it came from the Surgical

Department.

Q. Not specifically what you did in this case, but what is the usual procedure that the anesthesiologist will do when he is requested by a surgeon for a consultation?

[N-40]A. First he goes and gets the chart to see what has been done to this patient, see which kinds of tests, and so on, and then goes and talks to the patient and, if he wants to, examines him, and that makes a consultation.

Q. Did you do that in this case?

A. Yes.

Q. What did your review of the history and the -- your clinical findings reveal?

A. First, the history is that he is a young healthy man in his twenties, and physical examination is negative, which means he is in good health. Then I went and talked to him. Then I examined and I saw, palpated the bullet, which is right

here next to the shoulder; and that brought me back to my old days when I was a surgeon during the second world war, and we used to take out bullets like this all the time, you know, and it was no problem; so I just, you know, recollect what was in the 1940's.

So, I asked him has he had any other anesthesia, and he said that he has had two previous anesthestics, Your Honor, that is when he was young, a long time ago; and then, looking at the chart, my conclusion was that this bullet can be taken by a surgeon under local anesthesia. [N-41]Q. Now, based on your clinical findings --

A. Yes.

Q. -- how deep did you think the bullet was?

A. Well, I didn't have any X-rays; I didn't have anything, but as far as being palpated, it is not more than a few centi-

meters, so it is under the skin, muscle; it is not surrounded by any other tissue.

Q. At that time that you made your -- you had your consultation, you didn't have access to --

A. I didn't have X-rays.

Q. You had access to the 10 or 12 exposures that were done on the shoulder area at that time?

A. No, most of the time that is not necessary; if you see something like here, when you palpate it, Your Honor, you can make a clinical diagnosis.

Q. Have you seen one of the, one or more of the X-rays since the time that you had your consultation?

A. No, just -- I saw one today; Dr. Mendez showed me one, you know, but this was basically AP, anterior-posterior showing the depth. There can be done all kinds of studies. You can put the needle right here

ordinary course of practice in your profession to be asked by a surgeon to evaluate a patient for general anesthesia?

A. Yes, sir.

Q. In other words, a surgeon that makes a determination, I want general anesthesia; please tell me if I can do it?

A. Right.

Q. So, your opinion is that it could be done under a local anesthesia?

A. Or general.

Q. Or general, but your opinion that it could be done under a local would not in any way reverse the [B-43] surgeon's decision to do it under a general anesthetic?

A. No, this is just a statement that it could be done, which means the patient is a good risk to be done anyway.

Q. Now, you said that you were previously a surgeon?

A. Right.

Q. How long ago has it been since you

where the bullet is and you can see it, then you photograph it. This is the old timer method, Your Honor, but what he did is their way of doing it, and they did 12 studies and what they found, that is what it is.

[B-42]Q. You were present in the courtroom when Dr. Mendez was testifying?

A. Yes.

Q. You heard him testify that based on the radiology he feels that the bullet is two and a half to three centimeters deep?

A. I agree with you.

Q. If he were going to perform this operation, that he would want a general anesthetic?

A. That is fine. In my consultation, I stated that this patient, he's a good risk for a general anesthesia.

Q. Is it ordinarily the province of the anesthesiologist or surgeon to -- is it the

actively practiced surgery?

A. That's a long time ago, since 1945, 48, so I am out of the surgical domain, but I have been in the operating room all the time, so I can speak with a kind of authority.

Q. How long has it been since you removed a bullet?

A. Since '45.

Q. Let me go back. Dr. Mendez testified also that if the bullet had been located a half a centimeter below the surface of the skin that he would have -- and if he were going to do the operation that he would have used a local anesthetic, and he testified that the local anesthetic he would use would be a one-percent solution of Xylocaine. Can you tell me strictly from a point of view of an anesthesiologist what the risks are associated with the administration of one-percent solution of

Xylocaine?

[N-44]A. The usual risks which are connected with taking a drug, any drug which is a foreign body, it comes into your body, you can react to it in various ways. So you can have a reation. You can have a reaction from Tylenol -- I mean that is regular Tylenol -- or you can have a reaction from anything. So if the patient is given Xylocaine, there is a certain percentage, very minimal, of people who are going to react, and they can have hives; they can itching, you know; they can go into convulsions if it is overdosed or the patient is very sensitive.

Q. Would anthing more serious than hives or itching or convulsions, could anything more serious happen strictly from the Xylocaine, now?

A. Yes, sure, it can happen.

Q. What would be the full range of risks?

A. The worst he can have is convulsions, and convulsions, if they are not treated properly, he can have brain damage.

Q. Would there be a risk of death?

A. Well, eventually, yes.

Q. The convuisions leading to the brain damage would be caused by that anesthesia?

A. Yes, with the convulsions they stop breathing and eventually the brain is damaged, but this is a [N-45] far-fetched complication.

Q. Let me go back to your consultation. Would you ordinarily, if the surgeon is insisting upon a general anesthetic, before the general anesthetic is administered, would you want to see the X-rays or the area to be operated on?

A. Not necessarily.

Q. How about in this particular case?

Q. It doesn't matter, because once we

put the patient to sleep, what the surgeon does, it is his domain; he doesn't do any --

Q. What about the chest X-ray? Would you want to see that prior to the administration if you were going to administer that? Would you want to see that chest X-ray before you did it?

A. No.

Q. How about, would you want to see an EKG before you did it?

A. No, because if a patient is a good risk, which means that he's not sick from any other things, you know, who can walk or climb stairs or to live a normal life, and he's young, he wouldn't need the chest X-ray. Why? Just to raise the cost of our medical practice? That is not necessary.

Q. It was my understanding -- correct me if [N-46] I am wrong -- that these tests were performed to find out if there was anything wrong with the patient.

A. You can tell something, if he is healthy or not just by looking at him, talking to him. I mean, it is -;- and after all, we deal with patients every day, and we can look at you and we can figure things out, and if we think that there is a need for it, we will order X-rays; we will order everything, but to do it on anything or everything. I mean this is--

Q. Let me ask you if you are familiar with Dripps, Eckenhoff, and Vandam on Introduction to Anesthesia.

A. Sure, sure.

Q. In that text, if the authors of that text recommended that a pre-anesthesia consultation included blood tests or a urinalysis, EKG, chest X-ray, in addition to the X-rays of the area to be operated on, would they be wrong?

A. Do they state for everybody? I mean, if you are 40 years old or older, I'll

but that right away, but if you are younger, then if there is indication by history or by examination, then I would do it.

Q. If you were going to be the anesthesiologist in the operating room in this case--

A. Right.

Q. The surgeon, we'll assume, said, "I want [9-47] a general anesthesia," what general anesthesia would you use in this case?

A. I'll use sodium pentothal intravenously, a barbiturate which ultimately puts him to sleep.

Q. Is that the sole drug you would use?

A. Nitrous oxide and oxygen and maybe some Fentanyl morphine so that he doesn't have pain.

Q. Let me go back and try to take them in order. The first drug you would order would be sodium pentothal?

A. Yes, the first, but I will inject before that -- I will give him sedation.

Q. Which would consist of?

A. That would be morphine and Scopolomine or some Librium.

Q. That is morphine?

A. Scopolomine or maybe some Valium to put him at ease, you know. Patients, before they come to surgery, they are usually apprehensive; we try to make it easier for them the few hours before surgery to feel at ease, you know, so we give them something which will alleviate their apprehension.

Q. So that would be the pre-anesthesia?

A. Pre-anesthesia so the patient is in a good frame of mind; then he comes to the operating room; then [S-48] we start the intravenous injection.

Q. That is the sodium pentothal?

A. Then we give him water and glucose, keep the veins open, and then we inject

sodium pentothal. It is very pleasant way. I had it myself, so I speak from experience.

Q. Now, this is to induce an initial --

A. Sleep.

Q. Sleep?

A. Yes.

Q. After that is done and that is accomplished, what is the next step?

A. The next step, I put the mask on his face and start to give him oxygen and nitrous oxide, and nitrous oxide is an analgesic.

Q. Is the nitrous oxide the anesthetic?

A. Yes.

Q. Why is oxygen given?

A. The oxygen is given for safety.

Q. Could you elborate a little bit? For safety? What danger is that that oxygen prevents, again?

A. When you breathe air, regular air,

his is 20 percent oxygen. All right. So when we give him anesthesia, nitrous oxide, we'll give him about 60 percent nitrous oxide and 40 percent oxygen. This is done for [N-49] safety, because if you give too much sodium pentothal, you may depress respiration, so in order to have a safe margin, we increase the oxygen content of the breathing atmosphere.

Q. You say that too much sodium pentothal would do what?

A. Depress respiration. All anesthetics, if they are given in sufficient amounts, will depress vital functions.

Q. Would anything have to be inserted into the patient?

A. No, not for this case.

Q. You would use a mask, only the mask; that is it?

A. If we are opening the chest or working on the heart, then we put the tube in, but in this case by the time anesthesia is

established and everything, the procedure will be finished.

Q. Is the patient in this type of procedure, is the patient breathing by himself?

A. Yes.

Q. There is no assisting?

A. If I see that he is not exchanging enough, I will help; this is why I am there.

Q. Explain that a little bit, if you would, [N-50] please. If he's exchanging enough; what do you mean by that?

A. Normally you breathe about 400 c.c., you know; but if you get to be anesthesized, then you don't breathe so deep, you see, so in order to bring you to normal breathing, I will just squeeze the bag a little bit; that expands your chest; otherwise, if I am not there, you know, you give anesthesai, you just walk off, you know, then the doctor has to be there to take care of the patient

when he is under anesthesia.

Q. What would happen if he weren't exchanging with the sufficient frequency and there's nobody there?

A. Oh, well, then he eventually will die.

Q. What are the effects of the three pre-anesthesia medications that you described?

A. Well, just to put them in the right frame of mind, to calm them down, like morphine. Morphine is a very good drug to alleviate your fears. If you have pain, you don't have pain.

Q. Doesn't morphine have adverse effects?

A. Well, all drugs have adverse effects taken in sufficient amounts, but the amount which we give, you know, one shot or once or twice; you don't get addicted with one or two shots or morphine.

Q. There would be other adverse effects of [N-51] morphine other than addiction.

would there not?

A. Well, that is the main one. The others --

Q. Is there a possibility of an allergic reaction?

A. No. I mean, there is always a possibility of everything, but the chances are -- the probability is minimal.

Q. During this period of time after you have got him in the operating room and you have got him on the oxygen and the nitrous oxide, can you tell me what you are doing the whole time? Are you monitoring vital signs? If so, what are you monitoring?

A. Yes, sir, when he comes to the operating room he will be attached to a cardioscope. We put leads on the patient and monitor on the cardioscope his heart rythym, number one; number two, he has a blood pressure cuff on one of the arms so I can measure his blood pressure and see if

there is any fluctuation: and number three. I will put a stethoscope in the esophagus so I can hear with my ear the beating of the heart. so he will be monitored by three modalities.

Q. These are constant monitoring?

A. Yes.

Q. This goes on for the duration of the procedure?

[N-52]A. Right.

Q. Why is the cardioscope used?

A. So we can monitor his heartbeat: for instance. if he gets hypoxia when the heartbeat slows down or if there is any problem with the heart. you know. then it starts to skip beats. you know. then we have to do something. so--

Q. What might happen if you didn't have a cardiogram? I guess what my question is. if you weren't monitoring?

A. Well. nothing will happen.

THE COURT: Let's don't get into the problems that we don't have. Stick with the problems that we have.

MR. WINSTON: Your Honor --

THE COURT: What would happen if you didn't have that scope? Well, obviously they are going to have it.

MR. WINSTON: Judge, I think my point is there is a reason why they have a cardioscope in a general anesthesia situation where they don't have it in a local anesthesia situation.

THE COURT: I think it is obvious. If you are talking about increasing the chances of mortality, talk to him about that. Let's don't [N-53] just wander all around the operating room. The man is an expert: he can most likely tell you whatever you need to know.

MR. WINSTON: Well, You Honor.

this goes, back to my insufficient time to prepare. I am stumbling around -- it I am stumbling around, that is because I didn't have time to figure out how to ask the questions and I didn't have time to come with an independent expert.

BY MR. WINSTON: (Continuing)

Q. Let's go back to the nitrous oxide; then let me ask, what are the possible adverse effects of administration of the nitrous oxide?

A. Given properly, there are no adverse effects.

Q. What might happen if something goes wrong? Can you die from administration of nitrous oxide?

A. If you have 100 percent; if you are breathing 100 percent nitrous oxide, sure.

Q. Some percentage less than 100 percent?

A. No. If the mixture you are breathing contains 20 percent oxygen, no problem, which is equal to the air.

Q. If the oxygen were insufficient, that would cause what condition?

A. Well, that will depress the function

of [N-54] the body organs, and if it is prolonged can produce damage to the brain.

Q. Ultimately death?

A. Yes.

Q. Then, would there be any post-operative drug that you would order?

A. For what?

Q. For anything.

A. Well, if he has pain, we'll order something to alleviate his pain, but otherwise, no.

Q. That would be the province of the anesthesiologist?

A. Yes, when he is in the recove.y room. When he leaves the recovery room, then Dr. Mendez will take over. We don't want our patients to suffer, you know: we just try to take good car of them.

Q. Yes, I understand.

A. Without drugs, you can't do so, so we have to give them drugs.

Q. Let me go back tc the sodium pentothal and ask what some of the side effects of sodium pentothal might be. Is it a fair statement to say that -- well, first of all, let me go back, and is it a fair statement to say that cardiac depression is a side effect of that?

A. Yes.

[N-55]Q. In layman's terms, what does that mean?

A. Let's not talk about side effects, Your Honor. Any drug, Your Honor -- we'll take alcohol. You drink one Scotch, you're drunk; two Scotches, everything is fine, but if you drink lo, your heart function is going to be depressed: your brain is going to be depressed, so it is with all the drugs. If we give enough pentothal just to put the patient to sleep, there are no side effects. If we start to give more than that, you know, eventually the respiration is going to be

depressed: the heart can be depressed: everything is connected with the amount of dosage you give to the patient. That is the rule of using drugs.

Q. Am I correct that normally in a local anesthesia case there would be no pre-anesthesia medication? Am I correct in that assumption?

A. Not at all. A local anesthesia is even more important to have the patient quiet and maybe half asleep or not minding too much what is done to him. so pre-anesthetic medication for local anesthesia is very good.

One of the occasions for not using local anesthesia is a patient who is uncontrollable like children, you know. They are not very suitable, or a patient w[illegible] doesn't want to have an operation: he'll jump, he'll [N-56] move around, you know: he won't let you do it. So these people.

you have to sedate them somehow, and that is why general anesthesia is preferrable to these people and it gives, as Dr. Mendez said, very good operating conditions.

Q. Now, none of these -- in a local anesthetic situation if Dr. Mendez were going to do surgery similar to this in his clinic without the aid of an anesthesiologist, he wouldn't be using a cardioscope, would he?

A. No.

Q. Would he be continuing monitoring blood pressure and respiration?

A. No. But, you see, if you talk to the patient while you're operating, say, "How do you feel" and the patient says, "I'm feeling fine," that shows you that the heart is working right, that he's getting enough oxygen, and the brain is functioning, so this is a monitoring, just by talking to the patient. He tells you how he is.

Q. I asked you earlier your opinion as

to the risks of administering a one-percent solution of Xylocaine. I'd like to now go back through the drugs that you said that you would order if you were going to be the anesthesiologist on this case and ask you now more or less in terms of percentage, if you will, and comparatively with the one-percent solution of the Xylocaine, what the [N-57] risks involved with the sodium pentothal and nitrous oxide would be.

A. This is a question which is not properly stated. You cannot say, separate the drugs, one drug, another drug and a third drug. You can risks of the general anesthesia or local anesthesia, but the overall picture, this is what it is, general anesthesia or local anesthesia.

In general anesthesia, you use all these drugs, and then it depends, Your Honor, again depends on the anesthesiologist, how qualified he is, so, and, as you know, everything in life has risks. You sit in the

car and you drive; that is a risk to be killed by a car; you smoke; this is a risk you are going to get cancer; you are going to be anesthesized; that is a risk that you may have problems, so you always choose in your life what to do; and if you want general anesthesia, there are risks, sure.

We did a study at the Medical College of Virginia; for the last 13 years we have anesthesized almost 150,000 patients, almost 150,000 with general, local, the overall, and our results were, if we lump everything together for all anesthetics, the chances are that you may die from anesthesia, one in 12,000 cases. This is an overall picture. Now, to make it more [N-58] understandable to you, these chances are equal to the chances of being murdered in the United States within a year or to die in a car accident in 158 days; this is the overall picture. If we subtract children

less than 12 years old, the chances go one in 14,500. Now --

Q. Excuse me for just a minute, Doctor. Are you still speaking of all forms of anesthesia?

A. All together.

Q. Local and general?

Q. Local and general. This is what we found at the Medical College, you see. There are no such figures overall, you know, so this is one of the orginal studies in the United States for that. Now, this mortality was including all patients; and the patients at the Medical College of Virginia, 75 percent are high risk. We gauge the patients according to risk. If I anesthesized you, you are risk one; Lee is risk one; I am an old man and I am risk two; the Judge is risk one; but if you come with a poor heart or somebody who comes with a big liver, he is already

risk two, three, or four, so 75 percent of these patients were poor risks.

If we take the good risks, and the ones and twos, the chances to die from general anesthesia is one in 50,000, which are so far-fetched that --

Q. That is from a general anesthesia only?

[N-59]A. All together. All together.

Q. Wait a minute. The risk is --

A. To die from anesthesia.

Q. All forms?

A. All forms.

Q. The risk is -- you are class one?

A. Yes, one in 50,000 at the Medical College of Virginia. That may vary from hospital to hospital; it may vary from the anesthesiologist. I am talking about my department and what we do at the Medical College. If you go in the Martha Jefferson Hospital where I am going next Monday to

testify, that is a different story, so it varies from place to place, and there are no nationwide figures. This is the closest you can come, you know, so basically there is a chance of mortality with any type of anesthesia; the chances are minimal, but they do exist.

Q. Do you have any way or did your studies show, or do you have any way to compare the risks of a local anesthetic such as -- well, let's lump all locals together, versus a general anesthetic?

A. The local anesthesia is usually safer because it is done for small, minor procedures; and then you don't need too much drug to give, you know. Any more procedure, half an hour, 40 minutes, and so on, when you go into an hour or more procedure, then you [N-60] come into general anesthesia, prolonged surgery; then come different factors; then the patient's

status becomes very important, and it is very difficult to compare things, you know, and then people vary so much, you know, and they vary from day to day; people vary from day to day. I am going back to the same example I told about alcohol. One day I can drink two Scotches and I am sober as a judge; the next day I drink, you know, one and I am tipsy. I am the same guy; one day, two, nothing; the next day, one I am tipsy; so drugs vary with the status of the patient.

Q. Is it your testimony that you can't quantify the risks of the local anesthesia versus the risks of general anesthesia?

A. You mean quantifying in that way, medical or what?

Q. Statistically.

A. There is such catch-all comparison, because you can't compare one type of surgery with another type of surgery. It has to be

the same type of surgery and the same patient. That is a very unfair question. Is is not like cars. You can compare cars because they all have the same specifications, but patients are different.

Q. Now I'm talking solely about anesthesia [N-61] related.

A. Right.

Q. Related to death or injuries.

A. They depend on the status of the patient. If I give a local anesthesia to someone who is in very poor shape and is in for a cardiobiopsy when he has a poor heart and is given local anesthesia, he is a higher risk than if I give a local anesthesia for an ingrown toenail.

Q. But he's not a class one.

A. That's right; he's a class four.

Q. Even if you can't quantify statistically, do you have an opinion as to the risks of temporary injury, permanent injury, and death associated with general anesthesia

as opposed to those same risks associated with local anesthesia? Greater, less, how much greater?

A. If the patient will be in good hands, it is the same.

Q. That means it depends entirely on the anesthesiologist?

A. Correct; then comes the human element.

* * * * * * *

[N-62]CROSS EXAMINATION

BY MR. GARRETT:

Q. Dr. Boyan, how long have you been practicing anesthesia?

A. I have given anesthetics since 1940. As a surgeon, we used to give all the anesthetics and then go and operate.

Q. Can you give a rough guess or rough estimate of the operations which you performed the function of anesthesiologist?

A. Given anesthesia by myself? Oh, in my 30 years roughly five, six hundred per

year; maybe 100,000.

Q. Would you give Mr. Lee, if the Court were to order the operation to be performed, would you give him the same amount of anesthetic for this operation as you would for somebody who is going to undergo open heart surgery?

A. No.

Q. How long would he be under in the operation, less than half and hour?

A. Well, you know, how long the whole thing is depends on how he is reacting to the drugs. For instance, I would start with sodium pentothal. I will give him 100 milligrams and then wait for a while and see how he responds. Sometimes we see big, husky guys, you [N-63] give them 100 milligrams; they go out like a light. Other times tiny old ladies, you know, you give them half a gram and they are still awake. So, with Mr. Lee I will start with 100 milligrams and I will monitor blood pressure,

monitor how he reacts. If he needs more, I will add and I will add until we reach the level which is compatible with surgery, and then I say, "Mendez, go ahead; the patient is yours."

Q. And after the operation is completed?

A. After the operation is completed, you know, by that time we have given the drugs and subsequently he will metabolize the pentothal; the nitrous oxide will be exhaled, and he will wake up, and that is it, and sometimes patients don't even know that they have been operated on, say, "When are you going to operate on me?" That is after, and they don't know about it.

Q. Do you anticipate, as a result of the operation, his being incapacitated for any period of time after the operation?

A. No, he will go into the recovery room for half an hour; he will be watched, you know, and depending when he is judged that

he can leave the recovery room, he will be sent on his way.

Q. Walk out?

A. Well, we don't like them to walk because [N-64] they may sway a little bit, you know, so we don't; but my wife went and had a little operation and then she walked out to the car, you know.

Q. Under general anesthesia?

A. General anesthesia, no problem.

Q. If the Court were to order the operation, would you be there to perform the services of anesthesiologist?

A. Well, somebody from our department; it depends on what I am assigned that day to do. We have 50 doctors; it is a big department.

* * * * * * *

REDIRECT EXAMINATION

BY MR. WINSTON:

Q. Was it your testimony that my last

question to you had come down to your statement that everything depends on the anesthesiologist?

A. Sure, you know, his capability, his knowledge, his training, and so forth.

Q. Does that mean that only reason that a patient would be injured, either temporarily or permanently or die would be from anesthesia-related causes?

A. Yes.

Q. It would be as the result of malpractice [N-65] on the part of the anesthesiologist?

A. Most of the time.

THE COURT: I'll remember that one.

A. Yes, but you have to find out the cause and effect, have to find out if it is due to the anesthetics.

* * * * * * *

EXAMINATION BY THE COURT:

Q. Where did you get your experience in

removing bullets?

A. The bullets? It was in a Red Cross hospital during the war, and we treated all kinds of soldiers. I was on the other side, the losing side, the German side, yes, but we were an international unit, and we used to have all kinds of soldiers coming through us, you know, and they would say, "Oh, look at the bullet right here; take it out." "Sure, come on."

Q. John Wayne style?

A. Yes, that's right. And it was all shrapnel, pieces of shrapnel or grenades and everything. It was -- but at that time life is cheap, you know.

Q. Did you ever lose anyone that you [N-66] were working on with this kind of problem?

A. No.

Q. No problem?

A. No problem. I remember one day a

patient came from -- they were coming from Russia, and a whole transport came, and I changed the dressing of an arm that was amputated, you know, and I took it off and an artery started to spurt, you know, and I said to the nurse, "Come and bring me a clamp; this is precious blood," you know, and the soldier looked at me and said, "Doctor, blood doesn't mean anything; I have seen so much blood around." So, war time is different, you know.

* * * * * * * *

MR. WINSTON: I subpoenaed Dr. Whitley mainly because, You Honor, when we set this thing, we wanted to hear from the man who is going to do the surgery.

THE COURT: Well, I didn't know at that [N-67] time that Dr. Mendez-Picon was still as closely related to this.

* * * * * * * *

MR. WINSTON: The only thing I would want to show about Dr. Whitley are his qualifications; that he just finished his residency; that he has agreed to do the surgery, and he does require a general anesthetic. I might go into the risk element with him as well.

THE COURT: That is up to you. I don't want to do that unless it is necessary.

MR. WINSTON: Is he on his way?

MR. GARRETT: He's on his way.

MR. WINSTON: If he is on his way, apparently we can't stop him.

THE COURT: Oh, we can stop him. I don't want to sit here and listen to him just because he's available. If you want to put him on in support of your motion, I will certainly be glad to hear him; it is up to you.

MR. WINSTON: Well, as I indicated at the outset of the case, my concern is mainly with the evidence from the anesthesiologist and not with the evidence from the surgeon. I think I [N-68] need it to be in the record that he's the surgeon that is going to do the operation and he's going to require a general anesthetic.

THE COURT: I think that will be stipulated that he's the surgeon and he wants a general.

MR. WINSTON: Then let's stop Dr. Whitley.

THE COURT: All right.

* * * * * * * *

I'll tell you what, gentlemen, I'll let you get yourselves together and we'll recess until 2 p.m.

I assume that you have no further evidence by witnesses.

MR. WINSTON: No. Well, I would like -- yes, I do, I would like to call an independent anesthesiologist.

THE COURT: Do you have any available?

MR. WINSTON: No. As I represented to the Court at the outset, I have talked to one and the consult wasn't completed; the records weren't available.

THE COURT: There was no independent doctor here this morning?

MR. WINSTON: No, these doctors are all employed by the Commonwealth to perform the [N-69] surgery. I mean, calling someone in here as a fact witness.

THE COURT: Because they work for the State of Virginia or are paid by the State of Virginia? They do regard the oath that they take, which is probably more precious to

them than anything that they live by. Do you have any reason--

MR. WINSTON: No, but--

THE COURT: Do you know of any reason to think that Dr. Boyan was not being absolutely truthful with you this morning?

MR. WINSTON: Absolutely truthful?

THE COURT: Yes.

MR. WINSTON: I found -- I don't think any of his answers were untruthful; I found a lot of them wanting. He couldn't quantify statistics that my reading of the text tells me are quantifiable; that he tells me, that both of the doctors that have testified there is an phlethora of statistics; and I haven't had time to look into an expert witness, so I do, yes, I do have more evidence.

THE COURT: If you have an expert

at two o'clock, we'll hear him.

[N-70]MR. WINSTON: I know I can't have him here by two o'clock.

THE COURT: Well, we will hear him at two o'clock if you have him; other wise we'll hear your argument.

NOTE: At this time there is a luncheon recess at the conclusion of which the hearing continues, the defendant being present, as follows:

THE COURT: Do you have any further evidence, Mr. Winston?

MR. WINSTON: No, Your Honor, but I would like to make a proffer.

As far as the evidence is concerned, I called the anesthesiologist who I previously discussed this with, and that is Judith Fabian, M.D., and she'd be happly to and agreed to

testify for me at any point in time, but as far as being here at two o'clock, she absolutely couldn't because she is in surgery. I also attempted to call another anesthesiologist who was recommended to me and was unable to make contact, and I would like to present that evidence, an opportunity [N-71] to do so.

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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I

THE 21st DAY OF October 19 82

COMMONWEALTH

vs F-82-1417 through F-82-1420

RUDOLPH LEE, JR., Dft.

This matter is before the Court on a Motion for Rehearing filed by the defendant's counsel. A hearing was held at which the defendant was present; he was represented by his retained counsel, Joseph R. Winston. The Commonwealth was represented by Stacy F. Garrett, III.

Evidence was presented and testimony was heard on the general question whether a bullet shall be surgically removed from the defendant for the purpose of having same analyzed by a ballistics expert. The specific issue before the Court was whether

there had been a change in circumstances to warrant revoking or rescinding the Court's Order of August 25, 1982.

After hearing additional evidence and arguments of counsel, the Court finds that there is no material changes to warrnat revoking or rescinding this Court's Order of Augusut 25, 1982; therefore, the motion to revoke or rescind the August 25, 1982, Order is hereby denied.

It is hereby ORDERED that the Court's Order of August 25, 1982, granting the Commonwealth's Motion to Compel Evidence shall be complied with along with the following amendments:

(1) That the defendant, Rudolph Lee, Jr., present himself at the Medical College of Virginia at a time established by the Commonwealth for the purpose of having a bullet removed from his left shoulder area;

(2) That Dr. Raymond Whitley, or

another skilled surgeon as designated by the Chief of Surgery at the Medical College of Virginia, remove from the defendant a bullet located in his left shoulder area;

(3) That prior to such surgery, the defendant shall submit to any test required of the Medical College of Virginia as part of such surgical procedure, to include, but not be limited to, blood test, x-ray tests, EKG tests and urinalysis, and that all of the four above-listed tests be performed prior to any such surgery;

(4) That such removal of the bullet shall be performed in accordance with generally accepted medical procedures, with due regard be given to the health and perservation of life of the defendant;

(5) That such surgery shall be performed utilizing an anesthetic of general or local nature, the type to be selected by the operating surgeon;

(6) That if at any time during the course of the removal procedures, danger to the life of the defendant develops, such removal procedure shall cease and such other steps as may be necessary shall be taken to protect the health and life of the defendant; and

(7) That after removal of the bullet, such bullet shall be turned over to an authorized representative of the Richmond Bureau of Police for ballistics test and preservation as evidence.

It is further ORDERED that the said defendant shall not tamper with or disturb the aforesaid wound, or remove, destroy or dispose of the bullet lodged therein.

It is further ORDERED that the defendant cooperate with the appropriate medical personnel in order to minimize any discomfort or pain to him.

A motion by the defendant's counsel to stay the execution of this Order is hereby denied.

Thereupon the defendant was remanded to jail.

October 21, 1982

A COPY,

TESTE:

By /s/ Donna G. Hawley D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

RUDOLPH LEE, JR.

Petitioner,

v. CIVIL ACTION NO. 82-0672-R

ANDREW J. WINSTON, Sheriff, et al.

MOTION FOR A NEW TRIAL

Comes now Petitioner, Rudolph Lee, Jr., by counsel, and moves this Honorable Court for a new trial, and states as his grounds:

1. By Order entered October 15, 1982, this Court denied Petitioner's Application for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction and dismissed the Petition herein.

2. The Order aforesaid was based upon evidence in the record that the bullet sought to be removed was located 0.5 centimeters below the surface of the skin,

would require an incision of 1.5 centimeters to excise it, and could be excised with the use of a local anesthesia.

3. It has been learned by G. Mendez-Picon, Petitioner's attending physician, and from Ronald Whitley, M.D., the surgeon designated to perform the surgery that x-rays now show the bullet to be located one inch below the surface of the skin and that a general anesthesic will now be necessary.

4. That the surgeons aforesaid have requested an anesthesia consult from the anesthesia department of the Medical College of Virginia Hospitals and that the said consult was not completed as of 3:35 p.m. on October 20, 1982, in that the anesthesiologist, C. Paul Boyan, M.D., did not have access to the aforesaid x-rays which reveal the material change in circumstances.

5. The trial court held an evidentiary hearing on a Motion for Rehearing on October

21, 1982, over Petitioner's objection that there was a substantial probability that the three aforesaid physicians and surgeons would not be available to testify, that he could not consult his own independent medical expert on such short notice, and that he could not prepare argument and examination on such a complex issue as anesthesia and anesthesiology and particularly in light of the fact that the anesthesia consult had not been completed.

6. That the actions of the trial court have denied Petitioner an opportunity for a full and fair adversary hearing, and have effectively denied Petitioner any remedy by refusing to stay execution of the Order requiring the surgery.

7. Petitioner filed a Notice of Rehearing and Motion for Stay in the Supreme Court of Virginia on October 21, 1982, in order to have the actions of the trial court

reviewed by way of the Petition for Writ of Probation heretofore filed.

8. That the action of the Supreme Court of Virginia in failing to rule upon the Motion for Stay has effectively denied Petitioner any opportunity for appellate review.

9. That the actions of the State courts have deprived Petitioner of a full and fair opportunity for hearing.

10. Petitioner now is likey to succeed on the merits of his claim in view of the foregoing changes in circumstances.

WHEREFORE, Petitioner, Rudolph Lee, Jr., by counsel, moves this Honorable Court for a new trial on his Application for a Temporary Restraining Order, Preliminary and Permanent Injunctions, and Petition for Writ of Habeas Corpus.

RUDOLPH LEE, JR.

By /s/ Jos. R. Winston
Counsel

Joseph Ryland Winston
Counsel for Petitioner
HOUSE, LUBMAN & DAVIDSON
P. O. Box K-200
Richmond, VA 23288

CERTIFICATE

(Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

RUDOLPH LEE, JR.,

Petitioner,

v. CIVIL ACTION
NO. 82-0672-R

ANDREW J. WINSTON, Sheriff, et al.,

Respondents.

MOTION

Comes now the Petitioner, Rudolph Lee, Jr., by counsel, and moves this Honorable Court as follows:

1. This Court took jurisdiction over Petitioner's Habeas Corpus claim pursuant to 28 U.S.C. § 2241(c)(3) and of Petitioner's claim under 42 U.S.C. § 1983 pursuant to 28 U.S.C. § 1343(3).

2. By Memorandum Opinion and Order issued October 15, 1982, this Court denied Petitioner's Application for Temporary Restraining Order, Preliminary Injunction

and Permanent Injunction and dismissed the Petition for Writ of Habeas Corpus.

3. Because of a change in circumstances, Petitioner filed a Motion for a New Trial on October 21, 1982.

4. The said Motion for a New Trial was styled as such for want of a better title, but fairly informs the Respondents of the actions complained of and the relief sought.

5. The said Motion might have more properly been styled a motion to reopen the petition and to alter or amend the judgment.

WHEREFORE, the Petitioner, Rudolph Lee, Jr., by counsel, moves this Honorable Court to treat the Motion for a New Trial heretofore filed as a motion to reopen the petition, that the petition be reopened, that the Respondents be temporarily restrained and both preliminary and permanently and that a Writ of Habeas Corpus issue as prayed in the original Petition.

RUDOLPH LEE, JR.

By /s/ Jos. R. Winston
Counsel

Joseph Ryland Winston
Counsel for Petitioner
HOUSE, LUBMAN & DAVIDSON
P. O. Box K-200
Richmond, Virginia 23288

CERTIFICATE

(omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND VIRGINIA

RUDOLPH LEE, JR., Petitioner,	)	
v.	)	CIVIL ACTION NO. 82-0672-R
ANDREW J. WINSTON, et cetera, et al.	)	

November 8, 1982

Richmond, Virginia

Before: Honorable Robert R. Merhige, Jr.,
United States District Judge.

* * * * * * *

[M-3] P R O C E E D I N G S

(November 8, 1982) (Monday at 9:00 a.m.)

THE CLERK: Civil Action 82-0672-R, Rudolph Lee, Jr., versus Andrew J. Winston, Sheriff, et al. Mr. Joseph R. Winston and Mr. John W. Moore, III, represented the petitioner.

Mr. Stacy F. Garrett represents the respondents Winston and Davis.

* * * * * * * *

Are counsel ready to proceed?

MR. WINSTON: Your Honor, in that regard, may it please the Court, this matter was continued earlier today upon the granting of a temporary restraining order of the taking of additional evidence. At the time I felt that the granting of the temporary restraining order was for the maxium period allowed by the rule and was the most relief that I could have requested. In view of Your Honor's

admonition not to go telling the Fourth Circuit I did not have enough time, I did not represent to the Court that I had in fact a murder-maiming trial this past week that was scheduled to go [M-4] two days, but in fact went one. And for that reason, and also because of my unfamiliarity with medical issues, I associated Mr. Moore in the case.

Mr. Moore took the ball and ran with it as far as the medical issues are concerned. We have consulted four different anesthesiologists, three of whom were unable to be here at this hour -- well, excuse me -- three of whom were unable to be present on this Monday at all, and one of whom, Dr. Kennon, Chairman of the Anesthesia Department at the Medical College of Virginia, indicated he would be unwilling to testify on behalf of Mr. Lee since he had been consulted by the

Commonwealth.

As far as any additional medical experts are concerned, we have consulted with Dr. Armistead Williams, a general surgeon. Dr. Williams is willing to testify today but cannot be available until approximately noon.

THE COURT: That is no big deal.

MR. WINSTON: Well, at this point, Your Honor, the only thing that I would have to offer here at 9:00 this morning would be additional argument. I can offer Dr. Williams at noon.

THE COURT: All right.

* * * * * * * *

[M-5] THE COURT: Let me have my docket.

When does your T. R. O. run out?

* * * * * * * *

THE COURT: It runs out on the 11th. That is no problem. We can always, de-

pending on what the evidence is, extend it for ten days, if we have to.

Let me see if we can -- noon? All right. I will hear you at 12:00.

* * * * * * * *

[M-6] THE COURT: Let me see about Wednesday. Well, we will accomodate you on Wednesday, too. Just remind me of what hour.

* * * * * * * *

(A recess was taken at 9:06 to reconvene at 12:50.)

THE CLERK: Civil Action 82-0672-R, Rudolph Lee, Jr., versus Andrew J. Winston, Sheriff, et al.

Mr. Joseph R. Winston and Mr. John W. Moore, III, represent the petitioner.

Mr. Stacy F. Garrett represents respondents Winston and Davis.

* * * * * * * *

[M-7] ARMISTEAD M. WILLIAMS

• • • • • • •

DIRECT EXAMINATION

BY MR. MOORE:

Q. Would you please state your name, age, and occupation?

A. Armistead M. Williams, age fifty-six. I am a practicing surgeon.

Q. How long have you been practicing surgery, doctor?

A. Twenty-four years.

Q. Very briefly would you tell the Court where you obtained your medical degree and residency, and what type of [M-8] practice you have been engaged in since that time?

A. My medical degree from the University of Virginia in 1952. Training at Johns-Hopkins, Duke University, and finally at MCV.

Q. Did you do your residency at MCV?

A. Right.

Q. You are a general surgery, or do you have any specific area of surgery?

A. I am a general surgeon, and I do other surgery like gynecology. And I used to do some thoracic surgery.

Q. Have your (sic) ever removed any bullets from people's bodies at all?

A. Yes, I have, but usually it is when they are pretty superficial, and when they are not causing too much trouble. It is very rare that you have to remove one unless it is impinging on some organ that it might endanger. Usually they can sit there and not have to be removed.

MR. MOORE: Your Honor, I submit Dr. Williams as an expert.

THE COURT: Do you wish to cross-examine the doctor on his qualifica-

tions?

MR. GARRETT: I have no problems with the qualifications. He is being offered as an expert in what field?

[M-9] THE COURT: Surgery.

MR. GARRETT: General surgery. I have no objection.

THE COURT: That is my understanding.

MR. MOORE: Yes, sir.

THE COURT: He is qualified.

BY MR. MOORE:

Q. Doctor, you have been called down at my request, and you were kind to come down. You have had only a few moments, as I understand, to review the medical record of one Rudolph Lee, who is the subject of this hearing. I would like to show you at this time a set or series of x-rays.

* * * * * * *

Q. Dr. Williams, I submit to you that those are x-rays of Rudolph Lee showing the location of a bullet in his left shoulder. Have you had a chance to review those radiographs?

[M-10] A. Yes. I have just looked at them.

Q. Could you briefly tell the Court what you observed as a general surgeon as to the anatomical position of this bullet, and where it is located in relation to nerves, vessels, and other areas in the body -- I mean, other things in the body such as bones, or whatever?

A. Well, the relation is that this bullet appears to be well up into the axilla, which is the armpit. And it looks like it is fairly well above the brachial artery.

THE COURT: Above what?

THE WITNESS: Brachial artery, which I assume it is at the point where the subclavial artery becomes brachial. That means the artery comes from behind the clavical or collarbone, and it has become the artery to the arm, or the brachial artery. But this looks like it is at least two or possibly/three centimeters above the artery. That would place it above the vein, subclavian vein or axillary vein, and above the nerve plexus.

Q. As far as x-rays are concerned, you can't really tell precisely where the bullet is located in a person's body until you actually get in there; is that correct?

A. Well, the difficulty is that you have got more than -- you have got three dimensions. And where you think [M-11]

it is, it might be two or three centimeters one direction or another away from that plane. That is what makes all foreign bodies difficult to come down on.

Q. If you were the surgeon who is going to perform the surgery to remove this bullet, would you explain to the Court in detail the preparation of the patient and the various layers of skin, subcutaneous tissues and muscles and fibers that you would have to cut through to explore for this bullet?

A. Well, looking at the presumed location -- and I really haven't been able to see a direct lateral -- I think it would be very difficult to get a direct lateral x-ray of this because of the bone that would overshadow it and make it difficult to pinpoint. I will say that it looks like this, and from what the MCV x-ray reports indicate, this is several centimeters deep through the skin. This is straight in, medial, or inside of the

head of the humerus, which is the bone in the upper arm. It goes into the shoulder joint. Being this deep and far above the axillary artery, the bronchial artery, the subclavian, whatever you want to call that part of the artery, it would be pretty far in as far as approaching it from the front or the anterior position.

Now, this area we expose frequently in doing what we call thoraplasties where you collapse a lung for [M-12] tuberculosis. That access has to be gotten through a posterior chest incision.

Q. You turn the man on his side to do that?

A. Well, he is turned on his side and the scapula or shoulder blade is raised up. You go up under the shoulder blade to get into that area. I couldn't be sure that that wouldn't be necessary

to get at this area. That might be possible.

Q. If you turn someone on their side for this kind of operation, first of all, are you generally familiar with anesthesia and the agents and reaction upon the human body in your experience as a general surgeon?

A. Generally, yes.

Q. Could you describe to the Court what the anesthetic procedure, in your opinion as a surgeon, would be required for you to perform this surgery upon this individual?

MR. GARRETT: I object. This man has not been qualified as an expert in anesthesiology. His job is to take it out. The testimony before the Court has that the purpose of the Anesthesiology Department, the testimony of the anesthesiologist in

the operating room is the one to decide what kind and type of anesthesia to be used.

THE COURT: I am not sure of that.

[M-13] Who chooses the anesthetic, doctor?

THE WITNESS: The anesthesiologist will choose the anesthetic, but as far --

THE COURT: Does the surgeon have anything to say about that?

THE WITNESS: My choice only would be whether under local, which I would do myself, or whether anesthesia would be given in a general -- a general anesthetic.

THE COURT: Can you tell us, in this would this be done under local?

THE COURT: We are dealing then with an operation that in your view

would require general anesthesia?

THE WITNESS: Yes, sir.

BY MR. MOORE:

Q. Would it require intubation of the patient? By that I mean putting an endotracheal tube down the trachea of the individual and completely controlling his respiratory functions?

A. I think that would be the safest way, from my experience. As far as an anesthesiologist's viewpoint, I think they are more frequently more cautious about this than we are. [M-14] The only time we generally do operations without an endotracheal tube is when we are not going to move the patient. When the patient is laying flat on his back, we don't have to -- we don't have to worry about the airway, more or less. If you have to worry at all about the airway and moving the patient on the operating table or shifting

them, you have to worry about the airway and you ought to have an endotracheal tube.

Q. Do you have any estimate as to the time period from the moment of being induced into sleep until the time you have actually closed the patient and he has gone to the recovery room that that operation procedure might take? How much time it might take?

A. If you are lucky to be able to come right down on it, it might only be a matter of fifteen or twenty minutes. But with foreign bodies of most any kind the experience has been that if you think you are going to take fifteen or twenty minutes, you end up taking two hours and fifteen or twenty minutes. It is very difficult to predict the length of time it takes to find a foreign body. They are very, very difficult to find, even

one this large.

Q. The same might be said of an appendix, sometimes they are difficult to find, also?

A. That's right.

[M-15]

Q. Now, doctor, as far as the incision and going down through the anatomical layers, would you describe to the Court the tissue and layers of skin, subcutaneous and muscle fiber that would, in your opinion, look like might be required to find the bullet and extract it?

A. Well, like I didn't finish answering that other question you gave me in regard to that. It looks like this can be approached either anteriorly or through the axilla, up under the arm, or through the thoraplasty-type approach where you go up under the scapula on the

back.

Q. So either anterior, medial, or posterior approaches?

A. Anterior and lateral or posterior. It would appear to me that the -- I would probably approach this anteriorly because I am more familiar with that approach than I am through going way up into the axilla through the axillary approach. And I am not sure that would actually find it in the proper position, going through the back or raising up the scapula. Going through the anterior approach, if I decided that, you would go through the skin and subcutaneous tissue and immediately come on the pectoral major muscle which attaches to the head of the humerus right in the shoulder region, which we divide in the old style radical mastectomy. And resecting that, then you have the pectoral muscle which

is beneath it. It hooks into what is mentioned [M-16] on these x-ray reports as the coracoid process of the scapula, which is a bony prominence that sticks through in that area, sticks through anteriorly into the or below the clavical. The bullet may be in that area, and if it is, you would find it in that area. I think it is well enough above the artery and vein that perhaps you wouldn't have any problem with that, but you always have to keep that in mind. You might have a problem with a vein and the artery, and possibly the nerves. But I think they are remote enough.

Q. Those are the major nerves. What about minor nerves or arteries or veins that have been cut and cauterized in the process of getting in and getting out?

A. I don't think there are any large ones that you have to worry about

in that particular site where this bullet is.

THE COURT: Doctor, you say "may be in that area." When would you know?

THE WITNESS: I had access to the previous testimony from the MCV surgeon, who was Dr. Mendez-Picon. He indicated that he thought this would be far enough away from the nerve, and I agree. The only trouble is, we don't know how this bullet stopped in that location. They don't have any proof of arterial damage on these [M-17] arteriograms. The artery looks find, but that bullet, when it went in, was hot. And what it hit, we can't really determine. I don't see any fragments of the bones in the area, and I don't know exactly what stopped the bullet of

that size from going on through without hitting bone. The bullet, when it went through in its hot stage, could have burned enough of that axillary artery. And he might later on in the next several weeks or months develop an aneurysm of that artery. We don't know whether there was damage enough to that artery when the bullet went in, and whether we have to worry about it later. But it got there. I don't think it went through the point of entrance and just lodged where it is in a straight line. I think it must have hit something to keep it from going all the way through. And we don't know exactly where the bullet is from the standpoint of two or three centimeters one way or the other. That is what I mean. We know generally where it is, but you get in there and you think it is here, and it might be two centimeters over that

way. If it is in muscle, or if it is in dense tissue, it is very difficult to put even a clamp on it. That is what I mean by not knowing where it is.

[M-18]

THE COURT: You are talking about difficult on the part of the surgeon?

THE WITNESS: Right.

THE COURT: What effect does it have on the patient, the fellow that is being cut?

THE WITNESS: If you have to go digging through muscle to find it, which you frequently have to do in other areas of the body if you are trying to find a foreign body, it can result in some muscle damage. If you hit a nerve or a branch of a nerve to that muscle, you might cause some atrophy, but I don't believe the danger there would be that great that you have to worry too much about damage to the muscle or other nerves. It is the dislocation as far as --

THE COURT: I gather you couldn't guarantee there wouldn't be damage?

THE WITNESS: Well, I wouldn't guarantee anything like that, no, sir.

THE COURT: Could you get in there and then -- well, I am wondering if you could -- how much cutting would it take to find out precisely where that -- I gather you are satisfied it is a bullet?

THE WITNESS: Looks like a bullet.

[M-19]

THE COURT: From the x-rays,

right?

THE WITNESS: It doesn't look too damaged. That is what is amazing. That it has not flattened out from hitting bone or something. Whether it hit some -- this was in July, I guess?

THE COURT: I have forgotten.

MR. MOORE: July 18.

THE WITNESS: When these x-rays were made?

MR. MOORE: The x-rays were made --

THE WITNESS: July 18.

MR. MOORE: The dates are on the x-rays, I believe.

THE WITNESS: Apparently it was a fresh entrance wound noted by the examiner just below the collarbone. That means that in that hot weather he probably didn't have a leather

jacket on that would have slowed the thing down. He might have had a leather jacket on, you never can tell.

THE COURT: Can you tell whether it is in any bone now?

THE WITNESS: It doesn't appear to be in any bone now, no, sir. I think from all of the angles and other x rays it looks like it is free of being embedded in bone.

[M-20]

BY MR. MOORE:

Q. Doctor, what risks has a surgeon -- would you describe to the Court, if you were asked, what possibilities of risks exist in this particular surgical procedure?

A. The risks in general from any general anesthetic are cardiac arrhythmia that might cause cardiac arrest. That

is always a risk. It has gotten to be less of a problem with more knowledge and more monitoring equipment and so forth. We are able to prevent those kinds of things.

Q. Cardiac arrest can come about through a lot of things, can it not? Would you describe to the Court what hypotension is.

A. Hypo-, that is lowered blood pressure. That can occur because of the anesthetic, right.

Q. What about hypercapnia? Are you familiar with that term?

A. That is more of an anesthetic term where you have overventilation and that kind of thing. It will derange the electrolytes that the body -- the blood chemistry.

Q. And can result in permanent injury or death to the individual going

under the procedure; is that correct?

A. It has.

[M-21]

Q. I believe Dr. Boykin in prior testimony, and Dr. Mendez-Picon, talked about mortality rates. Do you have any comment about what we regard as morbidity rates, the things that occur to an individual less than death which are adverse effects as a result of the procedure?

A. Well, the morbidity of something like this would be soreness and inability to move the shoulder properly. We have to worry about this with radical breast operations where you are in the same area. You have to avoid too much activity at first to try to lessen the chances of blood or fluid collecting in the wound, and yet you have to have the activity as soon as possible to prevent the shoulder from getting stiff. That is the worse

morbidity that something like this would have would be where your patient is too sore to move and ends up with a frozen shoulder that he can't move above his head.

Q. You made reference to the procedure of cutting through the pectoral major and minor muscles in a radical breast mastectomy. Are you saying you would have to do the same procedure as far as the removal of this bullet is concerned?

A. If the bullet were deep into these muscles, which I assume it is, because those muscles are pretty much under the skin in somebody who is not real fat.

Q. So they overlap, too, do they not?

[M-22]

A. And overlap each other. They are probably in the way to a good extent getting to this location. You would

either have to spread them apart, separate them along the fibers, or would have to divide some fibers to get access to this area. If you did that, you would have some morbidity from that. The other morbidity aspect would be if you got an infection in this area. And generally when we dig deep in a place like this we will have some kind of drainage, either a drain which is a rubber tissue drain, or we will put a hemovac, which is a catheter with suction, in that area. So there would be some morbidity relating to the drainage from the wound.

Q. And a chance of infection in any surgical incision into a person's body, is there?

A. Always a chance of infection.

Q. There is always a chance of staph infection, also, which is an outlying kind of infection disease that we

see around many hospitals? It is unfortunate, but we do?

A. Fortunately the staph is not as much a problem as it used to be. It used to be we couldn't treat it with antibiodics (sic), but now we have antibiodics (sic) that take care of most staph. Some of them still are fairly resistant.

Q. How long would you need to have the drain tube in the shoulder area?

[M-23]

A. Anywhere from twenty-four to thirty-six hours, maybe.

Q. Doctor, would you consider this minor surgery?

A. Excuse me. Twenty-four hours to three days.

Q. Doctor, would you consider this minor surgery?

A. No sir.

* * * * * * * *

THE COURT: Before you start, Mr. Garrett, so that you can pick it up, did you see any later x-rays than July?

MR. GARRETT: That was my first question.

MR. MOORE: The x-rays are dated. Some are dated in October. Most of these are in October, I believe, of 1978.

THE WITNESS: This has the 18th, I guess, of July. I think you only had one arteriogram; is that right?

THE COURT: What I am trying to find out is if that --

MR. MOORE: There are other x-rays we have which are earlier.

[M-24]

THE COURT: Just a moment. I want to find out if Dr. Williams has

been talking about where that bullet -- assuming it is a bullet -- is now, and not where it was in July.

THE WITNESS: That is a good point, Judge Merhige. They can migrate. This is October 18? I believe the number is off on every one of them, just about. It has October 18. It doesn't have the year, but I assume that is this year, October 1982.

THE COURT: Now, you take your time, Dr. Williams, and you look at them. Assuming those dates are accurate, and we are talking about the same thing, tell me where that bullet is now.

THE WITNESS: Judge, it looks pretty much in the same location from those other pictures. And I assume that the point of entrance is

marked by a little marker. So it is actually not very far from that. But if you think you can find a foreign body by going straight through the point of entrance to where you think the thing is, you might be misled. The path of the bullet may not have gone that way, either. It may have gone in and hit something and come back to where [M-25] it is. This is July. It looks pretty much the same as the one in October.

• • • • • • •

MR. MOORE:

• • • • • • •

From your examination of the arteriograms of August of 1982 and the x-rays more recently reviewed by you of October '82, does the bullet appear to be in approximately the

same place?

THE WITNESS: Yes, it does.

• • • • • • •

CROSS-EXAMINATION

BY MR. GARRETT:

Q. Dr. Williams, did you examine that x-ray that had the marker on it?

• • • • • • •

[M-26]

A. There is one in July.

Q. The one in October?

A. With a paper clip marker. There is one in October, October 18, with a zero lead marker.

Q. Can you tell by looking at that the distance from the surface of the skin to the depth of the bullet?

A. It looks like it might be five centimeters, four to five centimeters. But that is, you know, it would be a lot farther away because of the projection

of the x-ray.

[M-27]

Q. It would be the other way around? It could be closer because of the magnification?

A. It could come right in. It looks like it is right next to it, but it looks to be four or five centimeters deep.

Q. How many times have you examined Mr. Lee?

A. None.

Q. You haven't felt the bullet in the shoulder?

A. No.

THE COURT: Can anyone tell precisely how deep this is before you get in there, doctor?

THE WITNESS: If you fluoroscope a foreign body from different projections you can estimate much better

than you can from a group of x-rays.

THE COURT: But that is the best you could estimate?

THE WITNESS: That is probably right.

BY MR. GARRETT:

Q. You testified earlier, Dr. Williams, that you had in the past had occasion to take some bullets out. When was the last time you did that?

A. I took birdshot out last week.

Q. How about a bullet such as the kind you have in this case?

[M-28]

A. It has been a long time since I removed a bullet this large.

Q. Talking about five years or ten years, or a year?

A. Possibly ten years ago I removed one in the emergency room, but usually you don't go after them if they are deep

and difficult to get at.

Q. All right, sir.

THE COURT: Would you have a recommendation as to whether this bullet ought to be removed or not if a patient walked in and said, "Doctor" --

THE WITNESS: I agree with Dr. Mendez-Picon that this ordinarily would not necessarily would not have to be removed.

THE COURT: Would your recommendation be that it be removed or not removed?

THE WITNESS: I would not make a big operation to remove it from a medical standpoint.

THE COURT: Your recommendation would be to leave it where it is?

THE WITNESS: Yes, sir.

BY MR. GARRETT:

Q. Is that because it is causing no physical problem to Mr. Lee at this particular time?

[M-29]

A. Yes, sir.

Q. Although you are aware if that is a lead bullet of studies that show that there is a possibility that exists of potential lead poisoning to Mr. Lee if the bullet remains in his body for an extended period of time?

A. I am not very aware of the real danger of that. I don't know that the shrapnel that was even in larger quantities left in a lot of people from World Wars I and II or Vietnam, whether it was steel or lead, but I imagine there was a lot of it that was lead. I don't know that you would go through several areas of the body removing it just worrying

about lead poisoning.

Q. You mentioned something, doctor. You said you would not consider this to be minor surgery. What do you make that basis on?

A. Well, I don't think anything really is minor surgery, because Dr. Bigger, one of my professors before he died, he said that minor surgery was only done by minor surgeons. And I think this kind of thing, if anybody handled it as minor surgery, would either be a minor surgeon --

Q. Pardon me, sir.

A. I think if anybody handled this as minor surgery, he would be a minor surgeon. I don't know many of my friends [M-30] that would call it minor surgery.

Q. You wouldn't put this in the category of open-heart surgery, would you?

A. I wouldn't call it that extensive, no, sir.

Q. Now, you mentioned something about the possibility might exist of an aneurysm that might occur later because of the bullet wound. How much later are you talking about from the time of the entry of the bullet into the body?

• • • • • • •

Q. How much time would it take for this aneurysm to develop, if one were to develop?

A. It depends on really how hot and how close it was to the artery. Any damage to the arterial wall could cause a weakness that would eventually cause an aneurysm to develop. And they can develop rapidly if it is very close and hot initially. Or if it is just really relatively luke warm and damage is very minimal, it might take two or three years

to develop.

THE COURT: Would the surgery exacerbate that situation? Would it make it more likely or less likely?

THE WITNESS: I don't think it would affect it unless you had to traumatize the area of the artery [M-31] with retractors or something like that.

BY MR. GARRETT:

Q. Would the fact that he has had no trouble since July 17 until today have any effect on or any basis on your conclusion?

A. You mean about an aneurysm?

Q. About an aneurysm developing.

A. I think the chances of him having an aneurysm probably are somewhat remote, but it would have to be kept in mind.

Q. Well, anybody can have an

aneurysm, can you not, just develop naturally?

A. Usually they don't occur in the axial brachial artery except through damage of some kind. They occur in the aorta or other vessels, some in the brain.

Q. Can you see arteries on those x-rays that you have there?

A. Yes. You mean on the arteriogram?

Q. Yes, sir.

A. Yes, sir.

Q. Do you see any arteries close to where the bullet is?

A. No major artery. The axillary artery is pretty [M-32] good distance from it on these x-rays.

Q. How far would you say is a pretty good distance?

A. Well, on this plane it is about two and a half to three centimeters.

Q. Surgery wouldn't have any difficult operating on them -- wouldn't cut that artery or anything like that?

A. It depends on how much retraction or other resection you have to do to get through that area.

Q. Do you think it would help if you had examined Mr. Lee and used your fingers to palpate or feel where the bullet is for you to make an observation about the depth of the bullet or whether or not surgery might be performed?

A. If I were to explore him, examine him with the x-rays, I would do all of it at one particular time.

Q. So you can't really tell us, can you, about the extent of the surgery, what is involved, if you haven't examined the patient, can you?

A. Well, that is true to a certain extent. It is possible, although it is

not too likely from looking at these x-rays that this bullet could be felt from the skin surface. If it could be felt from the skin surface, it might not be that difficult to go after and find something that big.

Q. So if you can feel it and move it around with [M-33] your fingers, you would be a whole lot --

A. It would give me a lot more courage.

Q. More courage on your part as doing surgery to go after it?

A. Right.

Q. And it would indicate, would it not, that it would be a whole lot less of a --

A. Might be less of a procedure.

Q. Less of a procedure.

A. But I assume this can be felt. I think they said this couldn't be felt.

Q. Pardon me. Who said?

A. I assume from the records, that they did not feel this bullet palpated through the skin.

Q. If I were to tell you otherwise, would that --

A. Oh, yes, it would influence me as far as making a decision.

* * * * * * * *

[M-34] REDIRECT EXAMINATION

BY MR. MOORE:

Q. You did briefly review the clinical history from the MCV records on Mr. Lee, did you not, even though you didn't personally examine Mr. Lee as far as the physical history of the individual was concerned upon admission?

A. No, I can't say that I did, Mr. Moore. I really went over the physical findings and the x-rays, but the history itself I did not go over.

Q. Well, the physical findings as related to his admission in the emergency room of MCV?

A. No. I didn't go over the history.

Q. If a bullet had entered the individual's anterior chest wall, if someone felt something there, could it perhaps not be scar tissue left by the bullet as it entered rather than the actual bullet itself?

[M-35]

A. Could be the track of the bullet that you feel with hematoma, that kind of thing, that has caused a thickening. But I think you could sort of tell whether it was -- if you definitely felt a bullet of this size, I think you could say it was the bullet and not hematoma.

* * * * * * *

[M-36] (On November 10, 1982, the following occurred:)

THE COURT: Good morning, gentlemen.

MR. GARRETT: Good morning, Your Honor. We have reviewed the evidence already before the Court and do not feel any additional evidence is necessary, and we will submit it on that basis.

THE COURT: Fine. That is the case.

Does either side have any further evidence?

MR. WINSTON: No further evidence, Your Honor.

IN THE UNITED STATES

DISTRICT COURT

FOR THE

EATERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

RUDOLPH LEE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action
	)	No. 82-0672-R
ANDREW J. WINSTON, et al.,	)	
	)	
Resondents	)	

The Order and Memorandum Opinion

dated November 12, 1982, can be found

in the Supplemental Appendix to the

Petition for Certiorari

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-6762

Rudolph Lee, Jr.,

Appellee,

versus

Andrew J. Winston, Sheriff;

Aubrey M. Davis, Jr.,

Appellants

and

Gerald Baliles; Circuit Court,

City of Richmond, Division I,

Defendants.

The opinion dated September 14, 1983,

can be found in the appendix to the

Petition for Certiorari

PETITIONER'S

BRIEF

Office Supreme Court, U.S.
FILED
JUN 15 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1334

In The

Supreme Court of the United States

October Term, 1983

ANDREW J. WINSTON

and

AUBREY M. DAVIS, JR.,

Petitioners,

v.

RUDOLPH LEE, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

When the intended victim of a robbery shoots his alleged assailant, is it a violation of the Fourth Amendment to the United States Constitution to require the alleged assailant to undergo an involuntary routine surgical procedure, characterized by his attending physician and the anesthesiologist as minor surgery, for the removal of a bullet lodged in the shoulder area of his chest, where the bullet is located approximately one inch below the surface of the skin, the proposed surgery would take less than thirty minutes, the surgical incision would be approximately two and one-half centimeters deep and five centimers long, the operating surgeon would use a general anesthesia, and the recovered bullet would be used in the alleged assailant's criminal trial on four felony charges relating to the attempted robbery?

PARTIES TO THE PROCEEDING

The *petitioners* in this proceeding are Andrew J. Winston, Sheriff of the City of Richmond, Virginia, and Aubrey M. Davis, Jr., Commonwealth's Attorney for the City of Richmond, Virginia; they are represented by Stacy F. Garrett, III, Esquire, a member of the Bar of this Honorable Court.

The *respondent* in this proceeding is Rudolph Lee, Jr., currently an inmate in the Richmond[, Virginia,] City Jail; he is represented by Joseph Ryland Winston, Esquire, also a member of the Bar of this Honorable Court.

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OPINIONS DELIVERED IN THE COURTS BELOW

The initial federal decision in the instant matter was reported in *Lee* v. *Winston*, 551 F. Supp. 247 (E.D. Va. 1982).

The decision which is the subject of this grant of certiorari was reported in *Lee* v. *Winston*, 717 F. 2d 888 (4th Cir. 1983).

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals for the Fourth Circuit was entered in this matter on September 14, 1983. A petition for a writ of certiorari was filed on December 13, 1983, and said petition was granted on April 16, 1984.

Petitioners contend that the Circuit Court improperly applied the parameters of the "unreasonable" standard of the Fourth Amendment to the facts of this case. 28 U.S.C.A. § 1254 confers upon this Honorable Court the jurisdiction to review the judgment of the United States Court of Appeals for the Fourth Circuit via writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVING THIS CASE

The Fourth Amendment to the United States Constitution states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In The

Supreme Court of the United States

October Term, 1983

No. 83-1334

ANDREW J. WINSTON

and

AUBREY M. DAVIS, JR.,

Petitioners,

v.

RUDOLPH LEE, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONERS

STATEMENT OF THE CASE

At approximately 12:55 a.m. on Sunday, July 18, 1982, Mr. Ralph E. Watkinson, the owner of the Lombardy Market located at 201 North Lombardy Street in Richmond, [Virginia,] was closing his business for the night (J.A. 11). As he was locking the door, he observed a subject coming towards him from across the street; the approaching subject was armed with a gun. As the subject came closer to him, Mr. Watkinson drew his own gun and turned towards the subject (J.A. 12, 17-18), who then hollered at Mr.

Watkinson to "freeze." Mr. Watkinson fired several shots. The first shot hit the subject in the left side of his body, and the impact of the bullet caused the subject's body to jerk toward the left (J.A. 13). The subject returned fire, hitting Mr. Watkinson once in both legs (J.A. 12, 16), and then ran from the scene (J.A. 13). The police were called and they responded almost immediately.

At 1:13 a.m., about eighteen minutes later, another police car responded to the 2200 block of Parkwood Avenue, about eight blocks from the Lombardy Market, and found Rudolph Lee, Jr.; he was suffering from a gunshot wound to his left chest area (J.A. 13). Lee and Mr. Watkinson were transported in separate ambulances to the Medical College of Virginia (MCV) Hospital (J.A. 13-14), but upon arrival were placed in the same emergency room by medical personnel (J.A. 14-15). Upon seeing Lee, Mr. Watkinson said[, "T]hat's the man that shot me.["] (J.A. 14).

Subsequently, Lee reported to the police that he was the victim of a robbery by two males, in which personal property was taken from his person; he further stated that he had been shot during the robbery. After an investigation, the Richmond Bureau of Police determined Lee's report to be untrue and marked it as being unfounded.

Arrest warrants for Lee were subsequently issued, charging him with four felony charges: Attempted Robbery, Use of a Firearm in an Attempted Robbery, Malicious Wounding and Use of a Firearm in a Malicious Wounding. On July 21, 1982, Aubrey M. Davis, Jr., Commonwealth's Attorney for the City of Richmond, Virginia, filed a Motion To Compel Evidence, seeking to surgically recover ..e bullet in Lee's left chest area (J.A. 6-9).

The Circuit Court of the City of Richmond, Division I,

conducted hearings on the issue, commencing on July 22, 1982 (J.A. 10-35a), and continuing on August 2, August 11 (J.A. 36-44) and August 25, 1982 (J.A. 45-59). At each proceeding, Lee was represented by counsel: initially by Harvey A. Goodman, Esquire, court-appointed counsel, and subsequently by Joseph R. Winston, Esquire, retained counsel (J.A. 10, 36, 45).

At the August 25, 1982, proceeding, Circuit Court Judge James M. Lumpkin made the following findings: that the bullet in Lee's body was one-half centimeter below the skin; that removal of the bullet would involve a minor surgical procedure using a *local* anesthetic; that the surgery would produce virtually no risk of permanent injury, no risk of neural damage, even temporary, and virtually no threat to life; that the surgery would be done in an appropriate medical hospital under appropriate medical safeguards; that Lee had several adversary hearings with full opportunity to call and cross-examine witnesses; and that it was not rebutted that the evidence sought is relevant and could be obtained in no other way. The Court granted the Motion to Compel Evidence, but withheld execution of the Order to enable Lee to seek appropriate appellate review. *See* J.A. 60-63.

On September 7, 1982, Lee was indicted by the Grand Jury of the Circuit Court of the City of Richmond, Division I, on the four felony charges upon which he was initially arrested.

Appellate review was sought. Briefs and oral arguments were presented to the Supreme Court of Virginia, and on October 13, 1982, that Court denied Lee's Petition for a Writ of Habeas Corpus and/or a Writ of Prohibition.

Lee then filed a Petition for a Writ of Habeas Corpus and Application for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction in the United

States District Court for the Eastern District of Virginia, Richmond division. He also included a claim under 42 U.S.C. § 1983. *See* J.A. 64-71.

On October 15, 1982, after a hearing on the matter, United States District Court Judge Robert R. Merhige, Jr., ruled that the facts before the Court did *not* establish an unreasonable intrusion into Lee's privacy under the terms of *Schmerber* v. *California*, 384 U.S. 757 (1966). The Court further ruled that Lee "is not likely to prevail on the merits of his claim that his [F]ourth [A]mendment rights would be violated by the proposed surgery" and dismissed the petition for a Writ of Habeas Corpus; the application for the various restraining orders was also denied. *See* J.A. 72 and the Supplemental Appendix to the Petition for Certiorari.

Action was then initiated at MCV Hospital to implement the Court-ordered and -authorized surgery upon Lee. Upon learning of the U.S. District Court's denial of Lee's motion, the original surgeon, Dr. G. Mendez-Picon, refused to perform the surgery on moral grounds, citing Lee's refusal to consent to the surgery. Lee's counsel was immediately informed of this development. Dr. Mendez-Picon arranged for another surgeon, Dr. Ronald Whitley, to perform the surgery, and he agreed to do so.

Dr. Whitley ordered pre-operative tests: blood test, electrocardiogram (EKG), chest X-ray and urinalysis (J.A. 84); Lee refused all testing but the X-ray (J.A. 85). The X-rays, using special markers to pinpoint the exact location of the bullet, revealed that the bullet was located between two-and-a-half to three centimeters deep into the muscle substance (J.A. 82-83). The bullet most likely had not moved; its position was now just firmly pinpointed (J.A. 100). Dr. Whitley decided that it would be safer to remove the bullet under general anesthesia (J.A. 83).

Lee's counsel was immediately notified of this development, as was the Circuit Court judge. When MCV Hospital personnel performed an examination/evaluation of Lee to determine if he were physically capable of undergoing surgery utilizing a *general* anesthesic, Lee's counsel was immediately notified and was given the names and telephone numbers of the MCV Hospital personnel involved.

Lee filed a motion for a rehearing on a change of circumstances, and a hearing was held on October 21, 1982, in the Circuit Court of the City of Richmond, Division I. Since Judge Lumpkin was recovering from recent back surgery, the Honorable Thomas N. Nance presided over the hearing. At the outset, Judge Nance delineated the issues that concerned the Court:

> (1) "Whether or not the situation, as it is, is going to be of any more danger to Mr. Lee than was previously heard [by Judge Lumpkin, the Supreme Court of Virginia and Judge Merhige]. That means in the sense of the movement or the current placement of the item or object, or whatever it is." (J.A. 77-78). and
>
> (2) "Also, the use of a general or a local anesthetic. I want to know if that is going to create any more danger to this man . . . ." (J.A. 78).

Lee's counsel responded, "That is all [that] I am interested in, too, Your Honor. . . ." (J.A. 78).

At this point, it should be noted that Lee's counsel objected to the hearing being held, claiming that he had been allowed insufficient time to acquire the presence of an "independent" anesthesiologist to contradict the testimony of Dr. C. Paul Boyan and to assist in scrutinizing Dr. Boyan's testimony. He indicated that Judith Fabian, M.D., [an anesthesiologist on Dr. Boyan's staff at the Medical College of Virginia] would "be happy to and [had] agreed to testify

for [Lee] at any point in time" but was unable to appear at that time. No proffer was made as to the expected contents of her testimony (J.A. 164-165), nor had a subpoena been issued for her presence at the hearing.

After hearing testimony from Dr. G. Mendez-Picon, Lee's tending physician, and from Dr. C. Paul Boyan, the anticipated anesthesiologist (who is also Professor Emeritus of the Department of Anesthesiology at the Medical College of Virginia), Judge Nance denied Lee's motion to stop the proposed surgery, stating, ". . . [A]nd the Court specifically finds that there is no material change in circumstances that would require this Court to change Judge Lumpkin's previous order." The Court then instructed both counsel to prepare a suitable order. This was done, and after modifying the proposed order in accordance with the wishes of Lee's counsel, Judge Nance entered same. *See* J.A. 166.

Lee's counsel then proceeded to the U.S. District Court with a Motion for a New Trial (J.A. 171). Enroute, he stopped off at the Supreme Court of Virginia and left a Motion for a Rehearing with the Clerk of that Court. Within fifteen minutes of Judge Nance's agreeing to enter the modified order, all counsel were in the U.S. District Court, Judge D. Dortch Warriner presiding, for a hearing on Lee's motion, which sought injunctive relief.

The thrust of Lee's second journey into the federal court system was two-fold: (1) he had been denied the opportunity to present his own "expert" anesthesiologist, and (2) the state Circuit Court was in error when it ordered the surgery to be performed. After a lengthy hearing, Judge Warriner ruled that since Lee was proceeding via habeas corpus, he had failed to exhaust his available state remedies, i.e., an appeal of the Circuit Court dicision to the Virginia Supreme Court.

The next morning, after learning that the Supreme Court of Virginia had denied his motion, Lee again appeared before Judge Warriner. After a short hearing, the matter was delayed for a week to enable the parties to secure the preparation of a transcript of the October 21, 1982, state Circuit Court hearing before Judge Nance.

On November 1, 1982, Judge Merhige reconvened the U.S. District Court hearing, heard arguments and gave Lee until November 8, 1982, to produce *"any evidence"* he wished the Court to hear on the subject; he also issued a Temporary Restraining Order, prohibiting any action toward the removal of the bullet in Lee's chest area without Lee's consent.

On November 8, 1982, Lee produced Dr. Armistead M. Williams, a *general* surgeon specializing in *masectomy* operations, who testified concerning his opinion re the proposed surgery to remove the bullet in Lee's left chest area. *At no time* did Lee call as a witness any anesthesiologist, nor did he request any extension of time to enable any such anesthesiologist to appear and testify. *See* J.A. 179-224. Dr. Judith Fabian was conspicuous by her absence.

The petitioners herein produced no new evidence before the U.S. District Court and on November 12, 1982, Judge Merhige entered his Order and Memorandum Opinion. *See* J.A. 226 and the Supplemental Appendix to the Petition for Certiorari.

An appeal to the U.S. Court of Appeals for the Fourth Circuit followed; on September 14, 1983, its opinion upheld the district court's order. *See* J.A. 227 and the Appendix to the Petition for Certiorari. Petitioner's quest for a favorable ruling by this Honorable Court followed.

SUMMARY OF ARGUMENT

While not seen every day, requests for court-authorized surgery are becoming more commonplace. Such requests face either a "per se" rule, which prohibits all surgical intrusion into human bodies, or the "reasonable" or "*Schmerber*" rule, which look at each request on its merits. Almost all courts follow the "reasonable" rule.

If the sought-after object is relevant, cannot be obtained otherwise and the proposed surgery will not amount to a major intrusion into the body, the surgery should be authorized.

In the instant case, the medical personnel characterized the proposed surgery as minor in nature, the surgeon ordered general anesthesia for the safety and comfort of his patient and the anesthesiologist stated the risks to Lee were "minimal."

In the 1980's it is commonplace to utilize a general anesthesia for outpatient surgery of the type proposed herein. The marvels of modern science and medicine have significantly reduced any risks to a patient undergoing a general anesthesia. Courts across the country are beginning to authorize general anesthesia. This Honorable Court should reverse the Circuit Court's ruling and should direct that the District Court's injunctions be lifted.

ARGUMENTS

I

The Fourth Amendment Does Not Per Se Preclude All Surgical Intrusions Into The Human Body

Our founding fathers exercised considerable foresight in including the Fourth Amendment in the Bill of Rights to the United States Constitution. Having recently won their

independence from the King of England, their desire was to insure against unreasonable searches, regardless of the source. And the Fourth Amendment has stood by us all. But it has not just one interpretation; in fact, it has many, and in some degrees, frequently changes. This Honorable Court, in *Schmerber* v. *California*, 384 U.S. 757 (1966), stated that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." And just two paragraphs later, went on to state with specificity the role of the Fourth Amendment when an intrusion into the human body is proposed:

> ". . . [T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. . . ." 384 U.S. at 768.

Thus the stage is set for the two irreconcilable lines of authority in cases involving surgical intrusions into the human body. These are the "per se" jurisdictions, which include *Adams* v. *State*, 260 Ind. 663, 299 N.E. 2d 834 (1973), *cert. denied*, 415 U.S. 935 (1974), and for all practical purposes, *Lee* v. *Winston*, the instant case, and the "reasonable" or "Schmerber" jurisdictions which include *Schmerber* v. *California*, *supra.*, and its progenies.

A.

The "Per Se" Rule

The "per se" rule is very easy to state: all intrusions into the human body are *per se* unconstitutional under the Fourth Amendment. The adoption of a *per se* rule by this Honorable Court would invalidate the Orders of Judge Lumpkin and Judge Nance in this case, and all like orders.

Prior to the instant case, *Adams* v. *State*, *supra.*, was the only case following or expounding a *per se* rule. In that case, the Supreme Court of Indiana was faced with a situation where a murder suspect had been ordered to undergo surgery to remove bullet fragments which were located in his hips and buttocks; the surgery was performed utilizing a local anesthetic. Following the holding in *Rochin* v. *California*, 342 U.S. 165 (1952), the Indiana Supreme Court ruled that any such surgery for the purpose of recovering evidence is violative of the Fourth Amendment per se.

But the *per se* test is not the correct test: it has been rejected by almost all other jurisdictions that have had occasion to face the issue; this Honorable Court has consistently rejected per se rules throughout the last decade; and the *per se* rule is based upon an inaccurate analysis of the *Rochin* case, which it purports to follow.

Rochin v. *California*, *supra.*, did in fact involve an intrusion into the human body in the form of a pumping of Rochin's stomach. The stomach pumping, however, was only the end of a long trail marked by an utter disregard for both state and federal constitutional law as well as ordinary human decency. None of the justices deciding the *Rochin* case found a violation of Rochin's Fourth Amendment rights; the majority found the totality of the circumstances so "shocking to the conscience" as to violate due process. 342 U.S. at 172. The fact that *Rochin* was *not* based on the Fourth Amendment was reaffirmed in *Irvin* v. *California*, 347 U.S. 128, 133 (1954) ("... Although Rochin raised the search-and-seizure question, this Court studiously avoided it....") and in *Breithaupt* v. *Abram*, 352 U.S. 432, 435 (1957) ("... We set aside the conviction [in *Rochin*] because such conduct 'shocked' the conscience and was so 'brutal' and 'offensive' that it did

not compart with traditional ideas of fair play and decency....").

Rochin, *supra.*, was not a Fourth Amendment case and certainly does not support any *per se* rule regarding bodily intrusions!

B.

The "Reasonable" or "Schmerber" *Rule*

By definition, this rule is not capable of being simply stated; rather, it strives for what is reasonable under the circumstances. It basically looks to the language of the Fourth Amendment, which only prohibits those searches and seizures which are unreasonable. Specifically, this rule follows the holding in *Schmerber*, *supra.*, wherein this Honorable Court upheld a warrantless taking of a blood sample from an individual charged with the criminal offense of driving an automobile while under the influence of intoxicating liquor.

Using the *Schmerber* opinion as a lighthouse, other courts have charted a course following this rule and allow surgical intrusions *if* they find and order that there is a clear indication that the evidence sought is present, that the evidence is relevant and could have been obtained in no other way, that the surgery is minor and is to be or was performed by a skilled surgeon so that every precaution is taken to guard against surgical complications, that pre-surgery adversary hearings are held with the defendant having the right to counsel present, and that before the surgery occurs the defendant is afforded appellate review. *United States* v. *Crowder*, 543 F. 2d 312 (D.C. Cir. 1976); *cert. denied*, 429 U.S. 1062 (1977) is the recognized front-runner follower of the "reasonable" test.

Crowder is important to study because not only is it the

mainstay of the "reasonable" test following, but also it illustrates the two different paths found within the "reasonable" rule. In *Crowder, supra.*, the United States Court of Appeals for the District of Columbia was faced with a defendant whose body held not one, but two bullets which authorities wanted: one bullet was located in his left thigh and one was located in his right forearm. The Court refused to authorize the removal of the bullet in Crowder's thigh because to do so might have caused the reduction of use or function of Crowder's left leg. The bullet in his forearm was another story: the examining physicians described the location of the bullet as immediately under the skin, the removal of which would involve no harm or risk to Crowder's arm or hand or the use thereof; the surgery was classified by the medical personnel as minor surgery. The removal would not affect any nerves and the risk involved would be similar to the risk in "crossing the street." Risk to the defendant would be "negligible." In authorizing the surgery to recover the bullet from Crowder's forearm, the court specifically rejected Crowder's contention that no intrusion into a man's body that goes beyond a needle prick can ever be authorized by a court. *See* 543 F. 2d at 316.

Crowder points out the two paths of the "reasonable" test: where the proposed surgery is classified as a *major* intrusion by the examining physicians or where there is a risk of death or permanent injury to the defendant or the surgery will worsen the defendant's condition, the surgery will *not* be allowed. On the other hand, where the medical personnel characterize the surgery as a *minor* intrusion, the object can readily and easily be removed and there is no substantial risk of injury to the defendant, the surgery will be allowed.

Examples where the proposed surgery was *not* allowed include the South Carolina case of *State* v. *Allen*, 291

S.E. 2d 459 (1982) (the bullet was located in the "gutter" of the left thorasic cavity, three-quarters to one inch beneath the skin surface and just *beneath* the defendant's rib and muscle; the surgery would take anywhere from forty-five minutes to two hours; the incision was to be four to eight inches long and one inch deep; the ribs would have to be divided, or a whole or a portion of a rib would have to be removed; there would be drainage for one or two days and there would be hospitalization for four to ten days); the New York case of *People* v. *Smith*, 362 N.Y.S. 2d 909 (1974) (the examining surgeon classified the proposed surgery as *major* surgery; the bullet was located beneath the rhomboid muscle in the posterior chest wall, underneath the muscles of the chest wall and outside the actual thorasic cavity; the incision would be at least six inches long; there was possible risk of life; there would be hospitalization for seven to eight days and the use of a drainage tube for one to two days); the Arkansas case of *Bowden* v. *State*, 510 S.W. 2d 879 (1974) (the bullet was lodged in the lower portion of the spinal canal; both of the examining doctors stated that a fatal risk was involved, that the proposed surgery was *major* surgery and that surgery could worsen the defendant's condition due to the involvement of spinal nerves); and the Missouri case of *State* v. *Overstreet*, 551 S.W. 2d 621 (1977) (incision was made three-and-one-half to four inches into the defendant's buttocks to remove metal pellets; no prior adversary hearing was held prior to the surgery; and no judicial determination was made whether the surgery would be a minor intrusion).

The instant case falls nowhere near any of the above-mentioned cases where the various courts have prohibited the requested surgery.

Those cases where the courts *have* authorized surgery to recover evidence in a human body include, in addition to

Crowder, supra., the Georgia case of *Creamer* v. *State*, 192 S.E. 2d 350 (1972), *cert. dism.*, 410 U.S. 975 (1973) (bullet was located in the fat, subcutaneous area of the right side of the chest, *within the area of the muscle;* the bullet could be felt by the examining physician and the proposed surgery would last no more than fifteen minutes); the Georgia case of *Allison* v. *State*, 199 S.E. 2d 587 (1973), *cert. denied*, 414 U.S. 1145 (1974) (bullet lodged superficially in the right side of defendant's back could be removed without damage to life or limb); the Missouri case of *State* v. *Richards*, 585 S.W. 2d 505 (1979) (bullet located four inches below the skin in defendant's hip; operation would not be difficult; and there would be no danger to life, limb, tissue, muscle or ligaments); the District of Columbia case of *Hughes* v. *United States*, 429 A.2d 1339 (1981), and 466 A.2d 533 (1983) (three bullets located just under the skin in defendant's right side and right hip; each incision would require but one or two sutures); the Florida case of *Doe* v. *State*, 409 So. 2d 25 (1981) (bullet lodged near the defendant's groin of his left leg about one-half inch beneath the skin surface; surgery would be minor; and no permanent injury to the defendant); the Louisiana case of *State* v. *Martin*, 404 So. 2d 960 (1981) (three-doctor panel was appointed to examine defendant and report on feasibility of surgery to remove bullet located between scalp and skull, where bullet could be felt with fingers; surgery would be minor and risk to defendant would be minor); the South Carolina case of *State* v. *Allen*, 291 S.E. 2d 459 (1982) (this was the second part of this case: As to defendant Allen, the bullet could be felt easily in its position in the defendant's left chest alongside the tip of his left shoulder blade; the surgery was classified as minor; the surgery could be performed within fifteen minutes with no permanent injury to the defendant); the New Jersey

case of *State* v. *Lawson*, 453 A. 2d 556 (1982) (bullet located in the soft tissue in the back side of the defendant's upper thigh; bullet not located in bone, but three-quarters to one inch below the surface of the skin; the examining surgeon described the proposed surgery as "not serious"); and the Alabama case of *Alabama* v. *Anthony Keith Johnson*, ___ Ala. ___ (5/25/84), *pet. for TRO denied*, ___ F. Supp. ___ (N.D. Ala. 5/25/84) (bullet taken from fatty tissue in chest area of back of Capital Murder defendant; bullet was located just beneath surface of skin and between skin and rib cage; incision was one to one-and-one-half inches long; physician categorized surgery as minor).

Clearly, the instant case falls within the grouping of cases in which the surgery was authorized. The only possible area of concern is the operating surgeon's requirement that a general anesthesia be used. And as will become very evident, that is a non-concern.

II

Use Of General Anesthesia Does Not Render Otherwise Permissible Surgery Unconstitutional

The surgeon in the instant case has stated that he will use a general anesthesia to remove the bullet from Lee's chest area, if this Honorable Court authorizes the surgery. Before a review is undertaken of general anesthesia, a quick look at Rudolph Lee, Jr., is in order.

A.

Rudolph Lee, Jr.

Respondent Lee has a bullet in his left chest area, the removal of which will require an incision of five centimeters in length (J.A. 88); according to x-rays, the bullet is located between two-and-one-half to three centimeters below

the surface of the skin into muscle substance (J.A. 83). The whole surgical procedure, from start to finish, could be completed *in less than thirty minutes* (J.A. 90). Even though Dr. Whitley desires to perform the surgery using a general anesthesia (J.A. 83), to make for safer surgery (J.A. 83), *all* of the medical personnel *who have examined Lee* characterize the proposed surgery as *minor* (J.A. 99, 106). The decision to require a general anesthesia is not unusual; it is very common in the 1980's to place patients under general anesthesia for minor operations. The out-patient department at MCV Hospital, where the proposed surgery will take place, performs at least ten surgery procedures daily; most of them are performed under general anesthesia. The patient has a general anesthesia at 10:00 a.m. and is ready to go home at 3:00 p.m. (J.A. 106-109).

Dr. Boyan, the anesthesiologist, examined Lee and in the course of the examination palpated the bullet (J.A. 121). At the conclusion of his examination, he made the following conclusions: that Lee is a young, healthy male in good health who has been placed under a general anesthesia on two separate, previous occasions in his life (J.A. 121-122); that he is a good risk for a general anesthesia (J.A. 124), being a member of Risk Level One (the highest of four such levels; Risk Level Four are the worst candidates, which include seventy-five percent of the population); that the possibility of allergic reaction to the anesthesia is minimal (J.A. 148).

B.

Use Of General Anesthesia Is Preferred In Proposed Surgery

Dr. Whitley prefers to utilize a general anesthesia in the proposed surgery, to make for a safer surgical procedure

(J.A. 83). Dr. Boyan, the anesthesiologist, testified that a general anesthesia is preferred over a local when the patient is uncontrollable, such as a child, or when the person does not want the surgery, like Lee (J.A. 144). Dr. Mendez-Picon stated that a general is preferred over a local anesthesia because the muscles are relaxed, which makes it easier for the surgeon to remove the bullet (J.A. 102). Under a general anesthesia, the risks to the patient are *less* through the use of a general anesthesia (J.A. 92-93); in addition, a general anesthesia gives *very good* operating conditions (J.A. 145).

The above comments, statements and testimony are from the medical personnel who have examined Lee and who will be involved in the operation to remove the bullet. These are the experts with their opinions based upon first-hand knowledge of both Lee's condition and familiarity with the operating room.

C.

Risk To Lee From General Anesthesia Is Minimal

Just waking up, getting dressed and eating breakfast in the morning encompasses significant risk: falling on the floor, cutting oneself while shaving, slipping in the shower, choking on a coffee-laden donut, and the like. But these are risks that one rarely considers. Likewise, the risks of being murdered in the United States in one year and the risk of dying in an automobile accident in 158 days are negligible; but they are the same risks that Lee faces if he were to undergo a general anesthesia to have the bullet removed (J.A. 147). Those figures are from a study done at MCV over a thirteen-year period involving 150,000 patients who received anesthesia. The chance of death

is one in 12,000; if children under the age of twelve years are excluded, the chance of death is one in 14,500, and that includes the fact that seventy-five percent of the people involved were in the high risk group. If only those in Risk Level One and Two are considered, the chance of dying is one in 50,000, which risk is "far-fetched" (J.A. 147-149). The chance of injury to Lee from a general anesthesia is somewhere between one in 20,000 to one in 50,000; the chances of injury, permanent or temporary, are "still very low, in [Dr. Mendez-Picon's] opinion, very small" (J.A. 99).

In the 1980's, the use of general anesthesia for minor surgery is routine, commonplace and "not a big deal." In the words of Dr. Mendez-Picon:

> ". . .[M]ost of the surgeries are done under general anesthesia in our clinical practice for comfort to the patient; and in spite of the fact we know that general anesthesia carries a little higher risk than a local, even if the patient is older, we believe the stress and pain is much, much less under general anesthesia." (J.A. 102-103).

D.

Court-Authorized Use Of General Anesthesia

While not commonplace or every-day in nature, Court-ordered surgery for the removal of a bullet is not unheard-of. And neither is the authorization for the use of a general anesthesia in such an operation. In *State* v. *Lawson, supra.*, the Superior Court of New Jersey, Appellate Division, ruled that "local anesthesia could be used if the patient cooperated; if not, *general* anesthesia *would* be used." Supra., at 557. And again just last month, the Alabama Supreme Court denied a Petition for Review from the Circuit Court of Morgan County, which had ruled that

> ". . . the alternative to the local anesthetic procedure would be performing the surgical procedure under *general* anesthesia which would involve some increase in risk *but would not be of such a risk as to be constitutionally impermissible.*" (Emphasis added.) *State of Alabama* v. *Anthony Keith Johnson*, No. CC 84-685.

As science has brought this country into the twentieth and twenty-first century, in fields ranging from mathematics to medicine, from aviation to the home-building industry, so should the law adapt itself to its surroundings. It was just a short five or so years ago that the standard treatment for a detached retina included long periods of immobilization; today, slight retinal tears are corrected by laser beams and extreme tears and detachments are corrected surgically via schleral buckles and injections of air bubbles into the eye. Unthought of just ten years ago, it is commonplace today. The "prick of the *Schmerber* needle" in 1966 was revolutionary; today, no one raises an eyebrow and the procedure is accomplished hundreds of times daily across the nation.

CONCLUSION

When foreign objects are imbedded in bones, are close to sensitive spinal canals, are wedged beneath or between ribs or are dangerously close to life-producing organs, the removal of which would seriously impair the patient's chance of survival or use of a limb or organ, they should not be surgically removed without the patient's consent. But where the bullet is just less than an inch from the surface of the skin and can be surgically removed in a simple, *minor* operation such as the one contemplated in this case, there is nothing unreasonable, as the Fourth Amendment uses that word, to require the patient to undergo the surgery. Cer-

tainly, there may be some risks, but they are extremely minimal and are far outweighed by the risk of society having to allow a man to withhold evidence of his crime at virtually no risk to himself.

It is patently clear that both the district court and the circuit court have substituted an analysis of the details of an ordinary and simple surgical procedure for an analysis of the risk that a general anesthesia presents to a patient. Since the proposed surgery, with a general anesthesia, is justified in the circumstances and will be accomplished in a proper manner, the judgment of the circuit court should be reversed, and the case should be returned to the district court, with direction that the injunctions be lifted and judgments be entered for petitioners herein, and, accordingly, petitioners Andrew J. Winston and Aubrey M. Davis, Jr., pray for such relief.

Respectfully submitted,

STACY F. GARRETT, III
Deputy Commonwealth's Attorney

June 14, 1984

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Brief of Petitioners and three true copies of the Joint Appendix were mailed first class, postage prepaid, to Joseph Ryland Winston, Esquire, The Mutual Building, Suite 615, 909 East Main Street, Richmond, Virginia 23219, by placing them in a United States Postal Service mailbox in the City of Richmond, Virginia, prior to the time that the above-mentioned items were filed with this Honorable Court.

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RESPONDENT'S

BRIEF

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,

No. 83-1334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ANDREW J. WINSTON, Sheriff
and
AUBREY M. DAVIS, JR.,
Petitioners,

v.

RUDOLPH LEE, JR.,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether it violates the Fourth and Fourteenth Amendments to the United States Constitution to require the accused to undergo surgery into the muscles of his chest, under general anesthetic, which is not medically necessary, in order for the State to recover firearms identification evidence which may or may not corroborate the testimony of the eyewitness.

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BRIEF FOR RESPONDENT

STATEMENT

On July 18, 1982, Lee was charged with attempted robbery, malicious wounding, and two counts of using a firearm in the commission of a felony.[1] On July 21, 1982, the Commonwealth filed a motion to compel Lee to undergo surgery for the purpose of recovering an object thought to be a bullet from his person.[2]

At a hearing on the Commonwealth's motion held July 22, 1982, G. Mendez-Picon, M.D., testified on behalf of the Commonwealth that an object thought to be a bullet was located in the upper portion of Lee's left chest. It had entered at the clavicular line under the collarbone.

The doctor testified that the location of the object was "somewhere around this area (witness indicating)." J.A. at 26-27. He opined that the surgery to remove it would last about forty-five minutes and that there would be a three to four percent chance of neural damage, a one percent chance of permanent nerve damage, and a one-tenth of one percent chance of death.

On August 25, 1982, Petitioner Davis appeared and requested an additional evidentiary hearing, stating: "It's the position of the Commonwealth that circumstances have changed. . . ." R. Vol. II, Tr. at 62. Dr. Mendez-Picon, again testifying on behalf of the Commonwealth, stated that he had examined Respondent since his first testimony and found a hard mass below the collarbone which had previously been

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[1] The date given is the date of the issuance of the warrants. The Grand Jury of the Circuit Court of the City of Richmond, Virginia Division I (now Circuit Court of the City of Richmond) returned indictments on September 7, 1982 charging attempted robbery in violation of Va. Code §§ 18.2-26 & -58 (1982 Repl. Vol.) (Case No. F-82-1417), malicious wounding in violation of *Id.* § 18.2-51 (Case No. F-82-1419), and using a firearm in violation of *Id.* § 18.2-53.1 (Case Nos. F-82-1418 & -1420). Bond was set at a total of $30,000.00 on August 11, 1982. The cases have been continued pending the outcome of these proceedings. Lee remains in jail.

[2] The motion, J.A. at 6-9, was never introduced into evidence in the district court. It is therefore not a part of the certified record.

obscured by swelling. He "felt that that was most probably the bullet," J.A. at 46-47, but said he had not confirmed this by x-ray because it was not medically indicated. J.A. at 48. "[T]he bullet seems to be just beneath the skin." J.A. at 37.

The doctor estimated that it would require an incision of only one and one-half centimeters to remove the bullet under local anesthesia. "[M]inor surgery of the type I have described will produce no danger on the basis that there's no general anesthesia employed." J.A. at 51.

That same day, the state trial judge entered the order compelling the surgery. The Supreme Court of Virginia approved the surgery on October 13, 1982, as did the district court on October 15, 1982.

On October 18, 1982, Lee was taken to the hospital in preparation for the surgery. It was discovered that the object was deeper than previously thought and that general anesthesia would be necessary. The medical personnel did not feel that the original order authorized general anesthesia and Lee was discharged from the hospital. J.A. at 84. Late that day, Lee filed a motion to rehear the question of the surgery in the state trial court.

On October 21, 1982, the rehearing was held over Lee's objection that two days was insufficient time to prepare effective examination of three or more medical experts. Again, Dr. Mendez-Picon, was called to the stand, this time by Lee at the virtual insistence of the state trial court. J.A. at 78.

Dr. Mendez-Picon, giving his third opinion as to location stated that:

> I had arranged for the patient to have some X-rays to determine whether that mass I was feeling was indeed a bullet or scar tissue; and the X-rays showed that the bullet was not in that area but it was about an inch deeper into the muscle.

J.A. at 82. When asked about the location of the object relative to the pleural cavity, he thought it was about five to six centimeters away, but "I can't tell for sure. . . ." J.A. at 93.

It was stipulated by the parties that Ronald E. Whitley, M.D., was the surgeon designated to perform the surgery and that he would require a general anesthetic. J.A. at 161.

The object was now thought to be two and one-half to three centimeters deep in the deltoid (shoulder) muscle. An incision of five centimeters would be required through the skin, fat, and fascia or layer covering the muscle. Then the muscle fiber would have to be spread by use of retractors and the object located. The scar tissue would then be removed and finally the object excised. Any bleeding would then be controlled and the layers sutured back together. Dr. Mendez-Picon thought this procedure could be done in less than one-half hour. The decision to use a general anesthetic was dictated by the more intrusive procedure which is more dangerous, J.A. at 105, and produces "considerable" pain. J.A. at 94.

Dr. Mendez-Picon stated that at no time has there been a medical reason to remove the object because the danger to Lee from it is essentially zero.[3] As compared to the local anesthetic procedure previously contemplated, there is "no question" that the risks are now greater. J.A. at 100.

The doctor said there is a greater possibility of infection and that there is increased risk of nerve damage "because you are five centimeters deep, three centimeters deep and that is where nerves are going to be located. . . ." J.A. at 99. A disturbance of the brachial plexus nerves could cause numbness for a week to a couple of months and cutting the nerves would cause paralysis for four months to one year, assuming regeneration. J.A. at 103-104. There is also some chance of death from the surgical risks alone. J.A. at 117.

Dr. Mendez-Picon also quantified the risks of paralysis to be 1:1,000 to 1:10,000 and of death to be 1:25,000 or 1:30,000.

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[3] At the time of his first opinion, Dr. Mendez-Picon said there was a small chance the object would have to be removed for medical reasons, but he could not make that determination for two or three weeks. J.A. at 29. At the time of his second and third opinions, he was certain that there was no medical reason for the surgery. J.A. at 49 & 87-88.

However, he admitted that the statistics he quoted were not supported by research. J.A. at 117-119.

C. Paul Boyan, M.D., an anesthesiologist, also testified. In order to induce the state of anesthesia, he would first administer "morphine and Scopolomine or some Liberium . . . maybe some Valium." J.A. at 132. This would be followed by sodium pentathol, a barbiturate, intravenously. One of the effects of the sodium pentathol is cardiac depression.

Following the sodium pentathol, nitrous oxide gas would be administered through a mask. This would be mixed with forty percent oxygen (as opposed to twenty percent found in air) to counteract the depressed respiration also resulting from the sodium pentathol. During the operation, the anesthesiologist would assist Lee's respiration and monitor his vital signs continuously through the use of a cardioscope, a blood pressure cuff, and a stethoscope. This is to prevent insufficient oxygen which could cause brain damage and death.

Dr. Boyan was unable to quantify the risks of general anesthesia. He did quote a mortality figure of 1:50,000 cited by Petitioners, Brief for Petitioners at 18, but made it clear that those figures were based on all anesthetics general and local. J.A. at 147-149. Although unable to quantify, he did say that general anesthesia was more dangerous than local anesthesia and was used for more prolonged procedures. J.A. at 150. As to the cause of anesthesia-related dangers, he testified that the dangers were most often the result of malpractice on the part of the anesthesiologist. J.A. at 157.

The state trial court, acting the same day, again approved the surgery, concluding that there had been no material change in circumstances. Because of the short period of time which had passed, Lee proceeded by a Petition for Rehearing in the Supreme Court of Virginia which was denied on October 28, 1982. Similarly, Respondent proceeded by a motion to alter or amend a judgment in the district court.[4]

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[4] Petitioners state that Lee "stopped off" at the Supreme Court of Virginia "enroute" to the district court. Brief for Petitioners at 6. They neglect to mention, however, that this course of action was dictated by the fact that the state trial court had refused to grant a stay, J.A. at 170, and Petitioners had refused to use the discretion as to timing granted them, J.A. at 167, to allow time for the Supreme Court of Virginia to act.

On November 8, 1982, Armistead M. Williams, M.D., a general surgeon,[1] testified in the district court on behalf of Lee. Although he had not examined Lee, he had reviewed the x-rays upon which Dr. Mendez-Picon based his third opinion. J.A. at 212.[2]

Dr. Williams agreed with the other surgeons that general anesthesia should be used, but disagreed as to the estimated time of the procedure. The problem with the x-rays, he said, was that the human body is three dimensional and an x-ray is only two dimensional. That "makes all foreign bodies difficult to come down on." J.A. at 188-189. Complicating the problem in this case is the fact that a direct lateral x-ray would be difficult to obtain because of the presence of bone which would overshadow the object. J.A. at 189. For these reasons, the operation could take from fifteen to twenty minutes to two hours and fifteen to twenty minutes to perform. J.A. at 194.

There was also a difference of opinion as to the physical approach to be used. If a lateral approach were employed rather than an anterior approach, the patient would have to be rolled on his side, necessitating intubation by endotracheal tube for the administration of the anesthesia, as opposed to a simple mask.

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[1] Petitioners assert that Dr. Williams specializes in "vasectomy (only) operations." Brief for Petitioners at 7 (emphasis in original). While there are references to the mastectomy procedure because of the similarity of the procedures, J.A. at 196 & 205, Petitioners stipulated to Dr. Williams' qualifications as a general surgeon, J.A. at 186. There is certainly no evidence that he specializes in vasectomies as suggested by the dissent in the court of appeals. 717 F.2d at 904, n. 1 (Widener, J. dissenting).

[2] Dr. Mendez-Picon was certain that the finding from his physical examination that the object could be felt was erroneous after reviewing the x-rays. J.A. at 92. Dr. Williams, after reviewing the same x-rays, was doubtful that this object could be felt. J.A. at 221-22.

Petitioners also assert that Dr. Boyan could feel the object. Brief for Petitioners at 16, but they neglect to mention that he did not have access to the x-rays at the time. J.A. at 122-23.

Dr. Williams further testified that a "rubber tissue drain" or a "hemovac" would have to be inserted to control drainage for one to three days. J.A. at 207. He stated that the anesthesia would carry dangers of cardiac arrythmia which could cause cardiac arrest, of hypotension or low blood pressure, and of hypercapnia, a deranging of the electrolytes which could result in permanent injury or death. J.A. at 204-205. The surgical procedure itself included dangers of infection and damage to muscle tissues.

Dr. Williams concurred with Dr. Mendez-Picon that it was more dangerous to remove the object than leave it in. He stated that he did not believe any surgical intrusion into the human body was a minor matter, and did not know anyone who would call this procedure minor surgery. J.A. at 217.

On November 12, 1982, the district court granted an injunction and writ of habeas corpus blocking the surgery. 551 F. Supp. 247. On September 14, 1983, the court of appeals affirmed the injuction, but vacated the writ of habeas corpus. 717 F. 2d 888. On April 16, 1984, this Court granted certiorari to review the affirmance of the injunction, 104 S. Ct. 1906, but denied the cross-petition to review the vacating of the writ of habeas corpus. 104 S. Ct. 1924.

SUMMARY OF ARGUMENT

Despite the claims of Petitioners as to the "marvels of modern science" and "laser beam" eye surgery—claims made without reference to the record or to any legal, medical, or scientific literature—the fact remains that surgery is an art supplemented by scientific knowledge rather than an exact science in itself. The procedures involved here are not to be accomplished by laser beams, but by the cutting and stitching of human flesh. The lack of precision is most vividly reflected by the fact that the doctor originally engaged to perform the surgery has given not one, but three opinions as to the location of the object. A second surgeon has explained that the current level of medical technology will not permit pinpointing the exact location of foreign bodies within the person.

The most certain aspect of the procedure here contemplated is that it will require forcibly rendering an individual unconscious by general anesthesia, involving the use of barbiturates and narcotics. The Court is asked to be the first to authorize a surgical procedure actually requiring general anesthesia, a procedure which even the dissenting judge in the court below found to be a "rude insult" to the body and to human dignity, the prospect of which "shocks" him.

And what is this assault on the body—digging through muscle tissue—this assault upon the mind—rendering the person unconscious—designed to produce? An object thought to be a bullet is the objective. But that can be shown through the use of x-rays and medical testimony. Could it be further identified through a microscopic examination of the bullet itself were it retrieved? The firearms identification expert did not know. We know, however, from the literature that there is a statistical probability of twenty percent that Watkinson's gun will not be capable of replicate firings. There is, therefore, that probability that the specimen will be useless, for there will be nothing to compare it with. To this must be added the chance, undetermined as to extent, that the bullet has or will be damaged either by its entry, its excision, or the effect of bodily fluids upon it.

And even if the bullet is identified, is it needed? Watkinson identified Lee as "the man who shot me." The police have investigated Lee's claim that he was shot by someone else and have determined it to be "unfounded." And if not needed for identification, is it needed for its deterrent value? Surely, if the prospect of being shot and killed, which is inherent in all of the bullet removal cases, will not deter, then neither would this piece of evidence.

So the balance must be struck between evidence which is of speculative value, wanted only to corroborate the direct evidence, and the rude and shocking assault upon the body, dignity, and privacy of the individual. The balance which must be struck is clear. This quest for corroborative evidence is not only an unreasonable search but is, in fact, shocking. It in-

volves a great expenditure of judicial resources for little, if anything, in return. The judgment of the court of appeals must be affirmed.

ARGUMENT

I. The Background In This Court.

The earliest case analyzing a search involving a bodily intrusion on due process grounds was *Rochin* v. *California*, 342 U.S. 165 (1952). The case involved police breaking into Rochin's home, attempting to remove two capsules which they had seen him put in his mouth, and taking him to the hospital to have his stomach pumped. The Court held that these actions—including:

> the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Id. at 172. It is noteworthy that the stomach pumping was done by a doctor at a hospital. *Id.* at 166.

Rochin, of course, involved action by the police without a warrant, but is an act which "shocks the conscience" any less shocking if it is ordered or later approved by a court rather than a police officer? The Court thought not:

> So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law.

Id. at 173.

The Court was first presented with a subcutaneous bodily intrusion in the due process context in *Breithaupt* v. *Abram*, 352 U.S. 432 (1957). There blood was withdrawn from the defendant, analysis of which showed that he was intoxicated. This evidence was used in securing a conviction for involuntary manslaughter. The Court noted that blood testing was nearly universal in our society, that forty-seven of forty-eight states

accepted such evidence either by statute or rule of decision, and that such evidence could even be compelled in civil actions such as paternity cases. *Id.* at 436-38.

The Court stated that the individual had the right "that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day." *Id.* at 439. But balancing the great accuracy of such tests and the deterrent effect they would provide in drunk driving cases, the Court held there was no violation of the Due Process Clause. *Id.* at 439-40.

Although the case at bar does not involve the exclusionary rule, the decision in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), holding that the rule was applicable to the states, gave the Court an opportunity to review a factual situation similar to *Breithaupt* in *Schmerber* v. *California*, 384 U.S. 757 (1966). The Court analyzed the facts under the more exacting requirements of the Fourth Amendment. *Id.* at 766-72.

Central to the Court's holding that the procedure was reasonable were the universality of the procedure as found in *Breithaupt*, *Id.* at 771, n.13, and the fact that:

> Extraction of blood samples for testing is a *highly effective* means of determining the degree to which a person is under the influence of alcohol.

Id. at 771 (emphasis supplied).

In concluding that the results of the blood test were admissible, the Court cautioned:

> It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States *minor* intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Id. at 772.

Against this background, the lower courts have reviewed the growing requests of police and prosecutors across the country for greater and greater intrusions into the human body.

II. Surgical Searches And Seizures In The Lower Courts.

There are no reported decisions involving court-ordered surgical intrusions prior to 1972. Since then, there have been nine published opinions from state courts of final resort[1] and one from a United States Court of Appeals,[2] aside from this case. In addition, there are eight reported decisions from state intermediate appellate courts,[3] and two from state trial courts.[4]

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[1] *Bowden v. State*, 256 Ark. 620, 510 S.W. 2d 879 (1974); *Hughes v. United States*, 429 A.2d 1339 (D.C.App. 1981); *State v. Haynie*, 240 Ga. 666, 242 S.E.2d 713 (1978); *Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (1972), *cert. dismissed*, 410 U.S. 975 (1973); *Adkins v. State*, 260 Ind. 663, 299 N.E.2d 834 (1973), *cert. denied*, 415 U.S. 985 (1974); and *State v. Allen*, 277 S.C. 386, 291 S.E.2d 459 (1982).

Three of the state supreme court cases deal not with the surgery itself, but procedural issues surrounding requests for surgery. *State v. Martin*, 264 S.2d 900 (La. 1981) (Case deals not with surgery as suggested by Petitioners. Brief for Petitioners at 13-14, but only with whether a three-doctor panel should be appointed to determine feasibility of surgery.); *State v. Fennell*, 391 A.2d 282 (Me. 1978) (Holding that the prosecution had no right to interlocutory appeal from denial of application for warrant.); and *State v. Overstreet*, 551 S.W.2d 621 (Mo. 1977) (Holding that bullets could not be used in evidence where defendant was not afforded adversary hearing and appellate review prior to surgery.).

[2] *United States v. Crowder*, 177 U.S. App. D.C. 165, 543 F.2d 312 (D.C. Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1062 (1977).

[3] *State v. Johnson*, ___ S.2d ___ (Ala. Cr. App. 1984); *People v. Brown*, 109 Cal. App. 3rd 117, 166 Cal. Rptr. 780 (1980); *Doe v. State*, 409 S.2d 35 (Fla. App. 1982); *Allison v. State*, 129 Ga. App. 864, 199 S.E.2d 567 (1973), *cert. denied*, 414 U.S. 1145 (1974); *Hughes v. State*, 36 Md. App. 12, 498 A.2d 583 (1983); *State v. Richards*, 8K. S.W.2d 505 (Mo. App. 1979); *State v. Lozano*, 167 N.J. Super. 85, 400 A.2d 526 (App. Div. 1982); and *Bloom v. Starkey*, 65 App. Div.2d 760, 409 N.Y.S.2d 773 (1978).

[4] *People v. Smith*, 80 Misc. 2d 210, 362 N.Y.S. 2d 909 (Sup. Ct. 1974).

State v. Anonymous, 32 Conn. Supp. 306, 352 A.2d 769 (Super. Ct. 1975) (Case deals only with whether a physical examination and/or x-rays should

A. *The "Just Beneath the Skin" Cases and the "For Se" Rule.*

1. *The "Just Beneath the Skin" Cases.*

The court of appeals case,[5] three of the state court of final resort cases,[6] and four of the state intermediate appellate court cases,[7] have involved factual situations which reveal a depth of no more than one-half inch, use of a local anesthetic, and a procedure lasting no more than fifteen minutes. The courts in these situations are uniform in allowing the surgery. The leading cases, as pointed out by Petitioners, are the early case of *Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (1972), *cert. dismissed*, 410 U.S. 975 (1973) and the only other court of appeals decision in *United States v. Crowder*, 177 U.S. App. D.C. 165, 543 F.2d 312 (D.C. Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1062 (1977).

Creamer was a murder case where the doctor ". . . could feel in the fat, subcutaneous area of the right side of the chest, within the area of the muscle, a foreign body. . . ." which x-rays revealed was metal. 192 S.E.2d at 352. "[I]t could be

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be ordered to determine if bullets were lodged in defendant and not the question of the surgery itself.).

[5] *United States v. Crowder*, 177 U.S. App. D.C. 165, 543 F.2d 312 (D.C. Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1062 (1977). The facts of *Crowder* are discussed in the text.

[6] *Hughes v. United States*, 429 A.2d 1339 (D.C. App. 1981) ("just under the skin," local anesthetic; fifteen minutes); *Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (1972); *cert. dismissed*, 410 U.S. 975 (1973) (facts discussed in the text); and *State v. Allen*, 277 S.C. 386, 291 S.E.2d 459 (1982) ("bullet could be easily felt less than a quarter of an inch below the surface," local anesthetic; fifteen minutes).

It should be noted that *State v. Allen* involved bullets in each of two defendants and that *United States v. Crowder* involved bullets located in two different areas of the same defendant.

[7] *State v. Johnson*, ___ S.2d ___ (Ala. Cr. App. 1984) ("fairly [most just beneath the skin," local anesthetic); *Doe v. State*, 409 S.2d 35 (Fla. App. 1982) (one-half inch beneath the skin surface; local anesthetic); *Allison v. State*, 129 Ga. App. 864, 199 S.E. 2d 567 (1973) ("just beneath the skin"); and *Hughes v. State*, 36 Md. App. 12, 498 A.2d 583 (1983) (dictum, same facts as commented case *Hughes v. United States*, decision based on Fifth Fourth and Credit Clause).

removed in no more than fifteen minutes with a local *and not a general anesthetic. . . .*" *Id.* (emphasis supplied).

Citing *Schmerber*, but with very little discussion, the Court upheld the surgery. *Id.* at 868. It is also interesting to note that Creamer's bullet was ultimately removed and it did not match any of the guns involved in the crime.[9]

Creamer is typical of the "just beneath the skin" cases although it has been criticized by a lower Georgia court[10] and one Georgia Supreme Court Justice has since said he is "not sure [he] could have concurred" in *Creamer*.[11]

In *Crowder*, "[t]he bullet was found 'immediately under the skin in the fat. . . . Not in any muscles' and 'Not in any effective portion of any major nerves or veins.' " 340 F.2d at 315. Local anesthetic was used, an incision of two and one-half centimeters was made, and the operation lasted ten minutes. *Id.*

Crowder was decided by a margin of five to four. The majority relied upon four factors in approving the surgery:

> (1) the evidence sought was relevant, could have been obtained in no other way, and there was probable cause to believe that the operation would produce it. (2) the operation was minor, was performed by a skilled surgeon, and every possible precaution was taken to guard against any surgical complications, so that the risk of permanent injury was minimal. (3) before the operation was performed the District Court held an adversary hearing at which the defendant appeared with counsel. (4) thereafter and before the operation was performed the defendant was afforded an opportunity for appellate review by this court.

340 F.2d at 316.

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[9] *Emmett v. Ricketts*, 397 F. Supp. 1025, 1032, n. 14 (N.D. Ga. 1973) (vacating Creamer's convictions on grounds of prosecutorial misconduct).

[10] *Allison v. State*, 129 Ga. App. 364, 199 S.E.2d 567, 569 (1973), cert. denied, 414 U.S. 1146 (1974).

[11] *State v. Hayes*, 240 Ga. 866, 242 S.E.2d 713, 715 (1978) (Hall, J. concurring).

While the result in *Crowder* may have been a reasonable one on the particular facts before the court, the test there propounded is inadequate to insure reasonable results in future cases. The court required probable cause that relevant evidence, obtainable in no other way, be found. It is submitted that there should not only be probable cause, but a "clear indication," *See, Schmerber*, 384 U.S. at 770, that relevant evidence for which there is a particular need be required. Therefore, if there is an eyewitness identification, then there is no particular need for further evidence of criminal agency.

Also, the court looked to whether there was a "minor operation" involving minimal risk of permanent injury rather than a "minor intrusion" involving "virtually no risk, trauma or pain." *See, Schmerber, Id.* at 771-72. The test propounded equates minor intrusion with the medical term of art "minor surgery," and ignores the trauma and pain factors. While the surgery there probably did constitute a minor intrusion with virtually no risk, trauma, or pain, the test propounded is insufficient to insure that result in future cases. Furthermore, there was no consideration given to the fact that the procedure in *Breithaupt* and *Schmerber* was "commonplace" in the sense that it was nearly universal. Certainly this type of surgery would only be commonplace to surgeons.

The dissenting judges focused on several factors:

> Unlike the blood tests and prehaps a few other very minor medical procedures which most Americans regularly and unhesitatingly undergo, surgical incisions entail preoperative anesthesia, post-operative pain killers, stitches and permanent scars. They involve much more in the way of physical and mental discomfort and anxiety. They pose significantly higher risks of infection and post-surgery complications, and an immensely greater personal affront.

Id. at 321 (footnote omitted).

The dissenters also felt that the bullet was not necessary in a broader sense. "[T]he comparative rarity of surgical explorations for evidence of crimes casts doubt on their need for

rate, this single case hardly constitutes a "line" of authority as Petitioners have stressed. Brief for Petitioners at 9.[17]

B. Greater Intrusions and General Anesthesia.

While the response of the courts, other than those applying a *per se* rule, has been to uniformly allow surgery to remove bullets "just beneath the skin," the response of the state courts of final resort[18] and the only other court of appeals having considered the issue[19] has been equally uniform in denying all surgery involving any greater intrusion. The response of the

[17] Another case involving a *per se* rule was *State* v. *Haynie*, 240 Ga. 866, 242 S.E.2d 713 (1978). There the defendant sought to subject the complaining witness to surgery in order to prove that the bullet lodged in him did not come from the witness' gun. Without any discussion as to the location of the bullet or the risks of removing it, the court held that "[t]he Fourth Amendment right of the victim to be secure against an unreasonable search must prevail over the right of the accused to obtain evidence for his defense." 242 S.E.2d at 715. Not only does this case cast doubt on the continued vitality of *Creamer*, but it also appears to lay down a rule that only those accused of crime may be forcibly subjected to surgery. While the case at bar involves surgery on a defendant and not a victim, *Haynie* is illustrative of the varied problems with which surgical searches and seizures are fraught.

There is one other case where a defendant's request to surgically recover evidence from a witness was denied. *People* v. *Browning*, 109 Cal. App. 3d 117, 166 Cal. Rptr. 293 (1980). Although holding that witnesses and defendants have the same Fourth Amendment rights, the court found the search to be unreasonable using a balancing test. 166 Cal. Rptr. at 297. Because of the lack of detail, it is not clear whether the surgery itself or the factors surrounding it led to this result.

[18] *Bourden* v. *State*, 256 Ark. 820, 510 S.W.2d 879 (1974) and *State* v. *Allen*, 277 S.C. 395, 291 S.E.2d 459 (1982).

[19] *United States* v. *Crowder*, 177 U.S. App. D.C. 165, 543 F.2d 312 (D.C. Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1062 (1977).

purposes of detection or deterrence." *Id.* at 322 (footnote omitted).

Perhaps of most importance to the dissenters was the fact that the trial judge would be at the mercy of the doctors in a 'battle of experts,' a battle impecunious defendants would have difficulty waging. *Id.* at 323-24.

Nevertheless, despite these criticisms, the decisions of the lower courts in the "just beneath the skin" cases have been uniform in their approval. Since it was to this class of cases that the case at bar belonged under Dr. Mendez-Picon's second opinion as to location, the district court originally approved the surgery. 551 F. Supp. at 252.

2. The "Per Se" Rule.

The only case to hold that any surgical intrusion into the defendant is *per se* unreasonable was *Adams* v. *State*, 260 Ind. 663, 299 N.E.2d 834 (1973), *cert. denied*, 415 U.S. 935 (1974).

There the metallic fragments were located " 'in the soft tissues of the left side of the pelvis chiefly behind the illiac wing . . . from a fraction of an inch to an inch and a half beneath the surface of the skin. . . .' " 299 N.E.2d at 841. They could be removed under local anesthesia with no pain, discomfort, or risk. *Id.*

The court, in a three-to-two decision, held that the surgery contemplated was a far cry from the prick of a needle in *Schmerber*: it was "an intrusion of the most serious magnitude." *Id.* at 837. In holding the surgery to be an unreasonable search, the court declared that it did "not sanction a surgical operation forced on a defendant for this purpose." *Id.*

It is not at all clear whether this surgery would have passed muster under a reasonableness standard because of the location of the bullets. It certainly would not have been approved in any event because the application for the warrant was *ex parte* without the right to counsel, adversary hearing, and pre-surgical appellate review other courts have required. At any

state intermediate appellate[6] and trial[7] courts has been to allow the surgery in some such cases and to deny it in others.

One of the earlier cases was *Bourden* v. *State*, 256 Ark. 820, 510 S.W.2d 879 (1974) which involved a bullet in the lower spinal canal. Removal would be under general anesthesia "involving trauma, pain and *possible* risk of life." 510 S.W.2d at 881 (emphasis supplied). The court, emphasizing *Schmerber's* "stringent standard of reasonableness" and the "potential misuse which could arise if we approved such a procedure," found that there was a major intrusion and denied the surgery. *Id.*

State v. *Allen*, 277 S.C. 595, 291 S.E.2d 459 (1982) also involved a bullet located three-quarters to one inch below the skin, beneath the rib and muscle but outside of the thoracic cavity. The surgical procedure would be under general anesthesia and would last from forty-five minutes to two hours. The incision would be four to eight inches long and one inch deep. The spreading of the ribs or the removal of a portion of one of them would be involved.[8] In denying the surgery, the court noted the range of dangers introduced by the use of general anesthesia possibly requiring assisted respiration:

> Neither [of the doctors] expected any lasting or permanent injury to the defendant were the operation performed, but both testified regarding potential risks from surgery. Although the probability of any risk is admittedly minimal, complications resulting in cardiac arrest, pneumonia or blood clot formation could arise from the administration of the general anesthesia. Another minimal risk is infection in the wound or incision. Finally, the doctors agreed that there is no medical necessity requiring the removal of the bullet. . . .

[6] *State* v. *Richards*, 585 S.W.2d 505 (Mo. App. 1979) and *State* v. *Lawson*, 187 N.J. Super. 25, 453 A.2d 556 (App. Div. 1982).

In *Bloom* v. *Starkey*, 65 App. Div.2d 768, 409 N.Y.S.2d 773, 774 (1978) we are told only that the bullet was located in defendant's thigh and that the evidence was insufficient to show that there would not be a major intrusion. It is therefore not possible to accurately classify the decision. It is placed here because all of the cases in this footnote involve surgery on the hip or thigh.

[7] *People* v. *Smith*, 80 Misc. 2d 210, 362 N.Y.S.2d 909 (Sup. Ct. 1974).

[8] *People* v. *Smith* also involved a bullet lodged in the muscle of the chest wall but outside the thoracic cavity. No bones were involved; the incision would have been six inches long. The procedure would take about an hour under general anesthesia. A rubber drain would be used for one or two days. 362 N.Y.S. 2d at 911. The spreading or removal of ribs was therefore not necessarily the decisive factor in *Allen*.

> 291 S.E.2d at 462-63 (footnote omitted).

Crowder also involved a bullet located in defendant's thigh. Removal was denied because it "*might* cause the reduction of use or function of his left leg." 543 F.2d at 313 (emphasis supplied). We are not told how deep the bullet was located or whether general anesthesia was involved. We know, however, from one other case that a bullet has been retrieved from a depth of four inches under local anesthesia.[9]

Petitioners rely upon *State* v. *Richards*, 585 S.W.2d 505 (Mo. App. 1979). There surgery four inches into defendant's hip was discussed. There is no mention of anesthesia, but the court noted that the surgery was in the best interest of the defendant. All of this is, however, dictum. The court noted that there were no questions presented for review as defendant had not made a motion for a new trial and the court reviewed defendant's arguments only because it would be "beneficial." *Id.* at 506. Additionally, it is difficult to understand the court's rationale: "This would not be a major or minor operation." *Id.*

In *Lawson* v. *State*, 187 N.J. Super. 25, 453 A.2d 556 (App. Div. 1982), a murder case, surgery was authorized to remove a bullet three-quarters to one inch deep in the soft tissues of defendant's thigh. It "was not lodged in the bone, nor was it near any major nerve or vascular structure." 453 A.2d at 557. A local anesthetic was to be employed. There would be "a relatively small incision," "mild discomfort post-surgically," and "minimal added scarring." *Id.* at 557-58. It should be noted that the need for the evidence was questionable in this case in that there was a sworn statement in which defendant had admitted his participation in the crimes as well as being shot by

[9] *State* v. *Overstreet*, 551 S.W.2d 621, 624 (Mo. 1977) ("buttocks").

the officer. *Id.* at 557. The necessity was apparently created by the defendant's filing of a notice of alibi defense. *Id.*

Petitioners boldly assert that "Courts across the country are beginning to authorize general anesthesia." Brief for Petitioners at 8. In support of this proposition, only two cases are cited. *Id.* at 18-19. In *Lawson*, the evidence was clear that the operation could be performed under local anesthetic and that the *only* reason for using a general was the defendant's unwillingness to cooperate. 453 A.2d at 507-08. The other case cited to support the proposition was the unreported Alabama trial court ruling which involved identical circumstances.[*] Quite understandably, these courts were not impressed with a defendant who stated that he would violate the court's order to cooperate, thus necessitating general anesthesia and then arguing that the risks of general anesthesia were too great. Such risks are of the defendant's own making.

The fact remains that no state court of final resort or United States Court of Appeals has ever authorized any intrusion beyond "just beneath the skin," and no court anywhere has authorized surgery itself requiring general anesthesia.

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[*] *State v. Johnson*, ___ S.2d ___ (Ala. Cr. App. 1984) (oral anesthetic). The dictum from the trial court's order quoted by Petitioners, Brief for Petitioners at 19, neglects to mention that the trial court did not order that general anesthesia be used, but instead ordered that:

> the Sheriff . . . shall render any aid or assistance requested by [the doctor] in restraining the defendant during the process of the surgical procedure. If such restraint is required or necessary, such restraint, if required, shall be only the minimal restraint required in order to carry out the orders of this court and such as may be required to prevent any injury to the defendant which may result from voluntary or involuntary acts by the defendant.

State v. Johnson, No. CC-84-665, Order of May 18, 1984 at p. 9 (Morgan Co. Cir. Ct.).

III. In Lee's Case The Consequences Of The Intrusion And The Affront To Dignity Far Outweigh The Alleged Need For The Evidence Which Is Of Only Speculative Value.

A. The Consequences of the Intrusion and the Affront to Dignity.

In contrast to the cases allowing surgery, the case at bar involves a procedure which would involve "considerable" pain, J.A. at 94, so much so in fact that a general anesthetic is necessitated. Any contention that the pain involved is minimal is clearly based on the pain Lee would feel after the administration of the muscle relaxants, the barbiturate sodium pentathol, the narcotic morphine, and the nitrous oxide gas.

In addition to the pain, there is the trauma factor. The trauma here has been defined as an incision five centimeters long and two and one-half to three centimeters deep. The surgeon would cut through skin, fat, fascia, and muscle, probing hopefully accomplished around and not through nerves. As the district court said, this "simply cannot be characterized as a minor intrusion," 551 F.Supp. at 260, and it cannot be said to involve " 'virtually no . . . trauma.' " *Id.* at 261 (quoting *Schmerber*).

To the considerable pain and trauma involved, there must be added the risks inherent in both surgery and in the use of general anesthesia.

As for the surgical risks alone, there is some small risk of mortality. J.A. at 117-18. Of greater probability is the morbidity factor. Because the object is located within muscle tissue, there is the possibility of muscle damage including soreness and inability to move the shoulder and head properly. J.A. at 200 & 206-06. Because it is where nerves are located, there is greater possibility of nerve damage, J.A. at 99-100, causing numbness or even paralysis. J.A. at 103-04. There is also greater possibility of infection. J.A. at 97 & 207-08. There would also be morbidity resulting from the use of a rubber tissue drain or hemovac to control drainage for one to three days. J.A. at 207-08.

General anesthesia adds other risks. The patient would first be given morphine and Scopolomine or Valium, J.A. at 132, then sodium pentathol, a barbiturate, intravenously. J.A. at 131 & 133. This would be followed by nitrous oxide gas administered through a mask. J.A. at 133. Effects of the sodium pentathol include cardiac and respiratory depression. J.A. at 134 & 143. The cardiac depression could cause hypotension, J.A. at 204, and even cardiac arrthymia causing hypoxia or cardiac arrest that could result in death. J.A. at 139 & 203. The depressed respiration could also cause hypoxia or anoxia resulting in brain damage or death. J.A. at 134-136[9] Another possibility is hypercapnia, a deranging of the electrolytes, which could cause permanent injury and even death. J.A. at 204-05. Another adverse effect is retrograde amnesia. J.A. at 155.

If the patient had to be moved during the operation as suggested by Dr. Williams, then endotracheal intubation would be required, J.A. at 198, opening up a new range of risks.[10]

It should be stressed that no court has ever authorized an intrusion of this great a magnitude into the muscles of the chest or involving such "considerable" pain. In fact, the courts having considered the issue of surgery actually requiring general anesthesia have detailed the risks relating to the cardiac and

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[9] The malpractice cases are illustrative. *See e.g., Amber* v. *Gutierrez*, 173 U.S. App. D.C. 100, 522 F.2d 1255 (D.C. Cir. 1976) (D and C, sodium pentathol; laryngospasm preventing oxygen to lungs causing brain damage); *Foster* v. *Englewood Hospital Ass'n*, 19 Ill. App.3d 1055, 313 N.E.2d 255 (1974) (shoulder separation; healthy and normal patient; large dose of sodium pentathol because patient apprehensive; respiration paralyzed causing death); and *Morrell* v. *Kiskire*, 27 Cal. App.3d 160, 103 Cal. Rptr. 461 (1972) (hemmorrhoids; sodium pentathol; anoxia causing brain damage).

[10] The malpractice cases also illustrate that improper intubation may cause anoxia, brain damage, and death. *See e.g., Aubert* v. *Charity Hospital of Louisiana*, 362 S.2d 1225 (La. App. 1978). There can also be damage to the teeth and mouth, *Sesselman* v. *Muhlenberg Hospital*, 124 N.J. Super. 285, 306 A.2d 474 (App. Div. 1973), even if there was no malpractice. *Lindsey* v. *Central Anesthesia Associates*, 161 Ga. App. 214, 289 S.E.2d 292 (1982) (Defense evidence that broken teeth are a risk one must accept in general anesthesia.).

respiratory depression inherent in the use of general anesthesia even though they found the statistical probability of death or permanent injury to be minimal.

The concern has been the degree of dangers introduced by the use of general anesthesia. The stakes are simply too high even if the risks are low, a point best illustrated by the need for a second physician, the anesthesiologist. His presence is necessary to *assist* the patient's respiration, J.A. at 135, and to monitor the patient by use of cardioscope, blood pressure cuff, and stethoscope. J.A. at 137-38. Why? Because of the very real danger of death, brain damage, or a variety of lesser injuries.

Petitioners style their second argument: "Use Of General Anesthesia Does Not Render Otherwise Permissible Surgery Unconstitutional." *Brief for Petitioners* at 15. Assuming, without conceding, that their proposition is sound, it is clear that the surgery here contemplated is not "otherwise permissible" due to the above stated surgical effects which are unrelated to the use of general anesthesia, especially the pain and potential muscle damage.

In support of their proposition, Petitioners cite only the unreported Alabama trial court and the New Jersey intermediate appellate court opinions. *Brief for Petitioners* at 15-19. As has been demonstrated, the references to general anesthesia therein were dictum occasioned by defendants' attempts to interject otherwise unnecessary risks into the proceedings.[11]

Petitioners stress that the surgery here contemplated will be done on an outpatient basis. *Brief for Petitioners* at 16. While the anesthesiologist opined that the surgery could be done on an outpatient basis, J.A. at 155-56, he admitted that when the patient "leaves the recovery room Dr. Mendez will take over." J.A. at 142. While Dr. Mendez-Picon testified that *some* surgeries under general anesthesia are done on an outpa-

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[11] In the case at bar, Dr. Mendez-Picon testified that the decision to use general anesthesia "was based on the standard of practice," J.A. at 107, and he resisted the prosecution's attempt to interject the defendant's non-cooperation into the issue. J.A. at 107-09.

tient basis. J.A. at 109, nowhere did he state that Lee's surgery would be done on an outpatient basis. Of course, if devices to control drainage are required, as Dr. Williams indicated, J.A. at 207-08, outpatient treatment would be impossible.

An important factor this Court must consider is the affront to privacy and human dignity that results from forcibly rendering one unconscious. No one ever rendered *Rochin* unconscious yet that conduct shocked the conscience.

Even the dissenting judge in the court of appeals described the procedure here as a "rude insult to the body and to the dignity of the person," 717 F.2d 907 & 08 (Widener, J. dissenting). He went on to say: "The intrusion into the human body at hand shocks the writer. . . ." *Id.* at 909.[9]

Petitioners' entire argument rests solely on the conclusory statement of one surgeon, contradicted by another surgeon, that the procedure constitutes "minor surgery,"[10] together with sketchy statistics indicating the risks to be minimal. They totally ignore the affront to Lee's dignity and privacy, downplay the level of the intrusion, and assume that any amount of pain can be inflicted so long as sufficient barbiturates and narcotics can be administered.

B. The Prosecution Does Not Need the Evidence Which is of Only Speculative Value.

The Petitioners' asserted need for the alleged evidence here is that it will constitute proof of criminal agency. Most bullet removal cases are murder cases where there is no victim to testify, but this is not the case here. As defense attorneys are acutely aware, robbery and assault cases nearly always involve identification testimony from the alleged victim. It is a

[9] Despite these feelings, he would have reversed. And perhaps because of them, he would not have entered final judgment, but would have remanded for a reassessment of the risks. 717 F.2d at 909.

[10] As both the district court and court of appeals recognized, there is no reason that a medical term of art should define the parameters of a constitutional standard. 581 F. Supp. at 280; 717 F.2d at 909-10.

fact that Watkinson has identified Lee as "the man that shot me." J.A. at 14. While the record reflects that Lee apparently told the police he was shot by someone else, it also shows that the police investigated that claim and determined it to be "unfounded." Brief for Petitioners at 2. For Lee to make that defense, he would have to face the prospect of rebuttal testimony from the officer who investigated the claim and found no evidence to support it. Lee's statement to the police has the additional effect of precluding any alibi defense inconsistent with that statement. The need, therefore, is only for circumstantial evidence to corroborate an already positive identification.

There is also the question of need in the broader sense. An important factor in *Breithaupt* and *Schmerber* was the need for blood testing in drunken driving cases across the country to reduce death and injury on our highways. The comparative rarity of surgical explorations for firearms identification evidence was recognized here by the state trial judge when he said: "there can be no comparison in the number of such cases." R. Vol. II, Tr. at p. 83.

Even if a need for the evidence were established, its probative value is an important factor to weigh in the balance which must be struck. Here the firearms identification expert could not say if the bullet would be capable of identification, J.A. at 40, in the sense of knowing positively whether it had or had not come from Watkinson's gun. In other words, it might be unidentifiable. He went on to say that the longer a bullet remains in a human body, the less likely it is that it can be identified, even though he could not pinpoint a time when it would become unidentifiable. *Id.* To these unquantified chances that the bullet itself cannot be identified, it must be added that there is a twenty percent chance that Watkinson's gun will not be capable of replicate firings.[11] Therefore, there is that probability

[11] In order for there to be a comparison with the questioned specimen, the gun from which it allegedly came must be capable of replicate firings. Twenty percent of guns larger than .22 caliber cannot produce replicate firings. R.J. Jaling, *An Overview of Firearms Identification Evidence for Attorneys I Salem' Features of Firearms Evidence*, 26 J. Forensic Sci. 153, 154 (1981).

that no comparison can be made at all even if the questioned bullet has not deteriorated or been damaged.

It is not surprising that the Brief for Petitioners omits discussion of the need for the evidence or the probability that it will, in fact, be probative, for it appears that both are minimal.

CONCLUSION

Petitioners' contention that to prohibit the surgery in this case would be to impose a *per se* rule, Brief for Petitioners 9-10, is absurd. We know that the district court does not preclude all surgery for it originally denied the application for a temporary restraining order. 351 F. Supp. at 252.

There are many factors in the record that were not present in the cases relied upon by Petitioners: the use of general anesthesia requiring a panoply of drugs rather than merely Xylocaine; the cutting and retraction of muscle tissue rather than simple fatty subcutaneous tissue; the proximity to nerves and veins; and the dangers and pain of the surgery itself, necessitating the general anesthesia.

A *per se* rule against all surgery may be the reasonable path, but it is clear, balancing the nature and scope of the intrusion, the risks involved, and the affront to dignity found here against the alleged need for evidence which may or may not corroborate the positive eyewitness identification, that this intrusion is not only unreasonable, but is, in fact, shocking.

For the foregoing reasons, the judgment of the court of appeals must be affirmed and the cause remanded with instructions that the costs of these proceedings, including such attorney's fees as may be reasonable, be taxed against petitioners.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

ANDREW J. WINSTON, ET AL.,

Petitioners,

v.

RUSSELL LEE, JR.,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUP

SUPPLEMENTAL BRIEF FOR RESPONDENT

This Supplemental Brief is presented to apprise the Court of a change in the incarceration status of Respondent, an intervening matter not available to Respondent at the time of his last filing in this Court. At that time, Respondent had been confined since his arrest in lieu of $30,000.00 bond. Brief for Petitioner at 11; Brief for Respondent at 1, fn.1.

Lee was served in jail with an order of the Circuit Court of the City of Richmond, Virginia to show cause why a previous suspended imposition of sentence in case number F-7961 should not be revoked. The sole ground for the revocation was the commission of the offenses for which Lee is awaiting trial in that court and to which the surgery in this case relates. A hearing was held on July 24, 1986, and by order entered on that date, the suspended imposition of sentence in the former case was revoked and Lee was sentenced to serve ten years in the Virginia penitentiary. Lee noted his appeal from that order and is pursuing his appellate remedies in the Supreme Court of Virginia.

Respectfully submitted,

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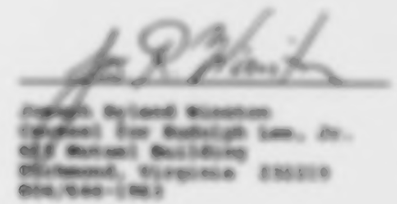
PROOF OF SERVICE CERTIFICATE OF BAR MEMBER

I, Joseph Ryland Winston, counsel for Rudolph Lee, Jr., respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of October, 1986, I served a true copy of typewritten manuscript of the Supplemental Brief for Respondent herein on Andrew J. Winston, 1701 Pacific Ave, Richmond, Virginia 23223, and Aubrey M. Davis, Jr., 800 East Marshall Street, Richmond, Virginia 23219, the only parties required to be served, by depositing it in a United States mailbox, with first class postage prepaid, addressed to their counsel, Stacy P. Harvard, III, Esquire, Deputy Commonwealth's Attorney, to his post office address at 800 East Marshall Street, Richmond, Virginia 23219.



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